Note

The Application of Title VII to Law Firm Partnership Decisions: Women Struggle to Join the Club

*"If I were asked . . . to what the singular prosperity and growing strength of [the American] people ought mainly to be attributed, I should reply: To the superiority of their women."**

I. INTRODUCTION

Throughout history women have faced a myriad of obstacles in their attempt to overcome the discrimination[1] practiced against them by the predominantly male legal establishment.[2] It was not until 1869 that Belle A. Mansfield purportedly became the first female attorney in the United States when she succeeded in overcoming an Iowa statute that had allowed only white males to become lawyers.[3] The significance of this development was soon diminished, however, when in 1872 the Supreme Court adamantly rebuffed Myra Bradwell's attempt to secure admission to the Illinois Bar.[4] Justice Bradley expressed a widely shared attitude toward women in the legal profession when he declared that:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of family organizations, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.
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> It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.[5]

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* A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA, Part II, Book III, at 262 (1863).

1. Discrimination is defined as "the act, practice, or an instance of discriminating categorically rather than individually." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 648 (1967).

2. *See* C. EPSTEIN, WOMEN IN LAW 82 (1981); P. HOFFMAN, LIONS IN THE STREET 11–12 (1973).

3. White, *Women in the Law*, 65 MICH. L. REV. 1051 (1971).

4. Bradwell v. Illinois, 83 U.S. 130 (1872).

5. *Id.* at 141–42 (Bradley, J., concurring).

Women were undeterred by this paternalistic attitude, however, and they persisted in their efforts to gain entry into the nation's professional educational and occupational institutions. Within the last decade the number of women graduating from the nation's law schools has significantly increased.[6] The objective criteria used by law schools to determine admission standards indicate that women applicants are as well qualified as men to study law.[7] Although the employment of women in the legal profession has trailed their enrollment in law schools, the number of practicing female attorneys quadrupled between 1970 and 1979.[8] As of 1981, women accounted for over fourteen percent of all attorneys in the United States.[9]

The growing number of women in the legal arena has prodded the traditionally male legal establishment into recognizing the qualifications of female applicants and expanding the job opportunities available to women in the profession. Sexist[10] attitudes and practices that prevailed within the occupation in the past in the form of sexual harrassment, discriminatory hiring, and blatant second-class citizenship have decreased,[11] only to be replaced by more subtle forms of discrimination. Less conspicuous problems now exist, stemming from a basically male institution with male mores attempting to accommodate female perspectives and participation.[12] This new form of sex discrimination is vividly demonstrated by the inability of female attorneys to succeed to the pinnacle of power, wealth, and prestige—law firm partnership. Although increasing numbers of female attorneys are being hired, significant resistance to female partnership remains.[13]

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6. In 1964 there were fewer than 2,200 women (4%) enrolled in accredited law schools. In 1974 the number of women had increased to 21,788 (21%). By 1981 women accounted for 44,986 (35%) of the total number of law students enrolled in accredited institutions. ASS'N. OF AM. LAW SCHOOLS & LAW SCHOOL ADMISSION COUNCIL, PRELAW HANDBOOK 1982–83 11 (1982).

7. A 1972 survey of eight leading law schools discovered that over 53% of the women enrolled in law school graduated in the top 10% of their undergraduate class, while only 38% of the men could claim such achievement. Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 572 n.46 (1973). The average LSAT score did not vary significantly by the student's sex.

8. Fossum, *Women in the Legal Profession: A Progress Report*, 67 A.B.A.J. 578, 580 (1981). The following statistics demonstrate the increase in the total number of female attorneys:

Year	Number of Female Attorneys	Percentage of All Attorneys
1970	13,000	4.9%
1975	26,000	6.6%
1979	59,000	11.0%

Id.

9. About 14% of the practicing attorneys in the United States in 1981 were female. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 388, Chart No. 651 (103d ed. 1982–83). The total number of female attorneys in the United States in 1981 was 81,921.

10. Sexism has been defined as "the tendency to behave towards and think about people purely on the grounds of gender, to generalize about individuals and groups on the basis of their biology rather than to recognize their actual interests and capacities." Pearson & Sachs, *Barristers and Gentlemen: A Critical Look at Sexism in the Legal Profession*, 43 MOD. L. REV. 400, 407–08 (1980).

11. Margolik, *Wall Street's Sexist Wall*, NAT'L L.J., August 4, 1980, at 58, col. 1.

12. *Id.*

13. Burke & Johnson, *More Women on the Way Up*, NAT'L L.J., April 20, 1981, at 1, col. 1. In a survey of the fifty largest firms in the country, the following statistics were compiled:

1980		
Total Attorneys (Female/Male)	1,658 women out of 10,679	(15.5% female)
Total Associates	1,537 women out of 6,408	(24.0% female)
Total Partners	121 women out of 4,271	(2.8% female)

This Comment will trace one woman's struggle to become a partner at a large, prestigious law firm and her unsuccessful efforts to convince the judiciary that Title VII jurisdiction extends to discriminatory practices within law firms.[14] The availability of Title VII remedies for discriminatory denial of partnership is crucial for a substantial number of women who have served the requisite apprenticeship time period as associates and thus will soon be seeking to become partners within their law firms.[15] This Comment will examine the proposed application of Title VII to law firms, the judicial reluctance to accept this theory, the remedies available if Title VII would apply to the partnership decision, and finally, how law firms can avoid potential Title VII litigation claims.

II. An Overview of Title VII

A. *Purpose and Scope*

Title VII of the Civil Rights Act of 1964[16] was the first attempt by the federal government to provide comprehensive legislation prohibiting discrimination against minorities and women in private employment.[17] Although a significant amount of political maneuvering resulted in an unclear and peculiar legislative history,[18] the courts have determined that Congress intended to outlaw any employment practices that discriminate against any individual on the basis of race, color, religion, sex,[19] or national origin.[20] In fulfilling this purpose courts have used Title VII to eliminate financial disparities resulting from sex discrimination,[21] prevent sex stereotyping in

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1979		
Total Attorneys (Female/Male)	1,329 women out of 9,652	(13.8% female)
Total Associates	1,242 women out of 5,820	(21.3% female)
Total Partners	87 women out of 3,832	(2.3% female)

See also C. Epstein, Women in Law 175–218 (1981).

14. Hishon v. King & Spalding, 678 F.2d 1022 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

15. An associate is now considered for partnership at most large law firms after eight to ten years. Morrison, Making Partner: Tradition in Flux, Nat'l L.J., April 12, 1982, at 1, col. 4.

16. 42 U.S.C. §§ 2000e–1 to 2000e–17 (1976).

17. Morton v. Mancari, 417 U.S. 535, 545 (1974); *See also* Comment, *A Look at* Love v. Pullman, 37 U. Chi. L. Rev. 181, 181 (1969).

18. For a complete analysis of the legislative history of Title VII, see Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 Indus. Rel. L.J. 1 (1977); Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431 (1966).

19. The addition of sex as a prohibited basis of discrimination was introduced by an opponent of Title VII as a floor amendment designed to obstruct the passage of the bill. *See* 110 Cong. Rec. 2577 (1964) (remarks of Congressman Smith). Representative Smith, a principal opponent of the original bill, offered the amendment "in a spirit of satire and ironic cajolery." Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431, 441 (1966). The spirit and intent of the amendment forced some supporters of the bill to vote against the amendment. Representative Green, attempting to prevent the obstructionist tactics from torpedoing the entire legislation, registered her opposition to the amendment, stating that "it will clutter up the bill and it may later—very well—be used to help destroy this section of the bill by some of the very people who today support it. And I hope that no other amendment will be added to this bill on sex or age or anything else, that would jeopordize our primary purpose in any way." 110 Cong. Rec. 2581 (1964) (remarks of Representative Green).

20. 42 U.S.C. § 2000e–2(a)(1) (1976). *See also* Fekete v. United States Steel Corp., 424 F.2d 331, 336 (3d Cir. 1970).

21. Mengelkoch v. Industrial Welfare Comm'n, 284 F. Supp. 956 (C.D. Cal. 1968), *appeal dismissed*, 393 U.S. 83 (1968).

employment criteria,[22] provide equal access to the job market,[23] and prohibit protectionism and paternalism.[24]

The pertinent language of the Act provides:

> (a) It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[25]

Although its prohibition of discriminatory employment practices is extremely broad, Title VII does allow an employer to take certain action based on religion, sex or national origin when that factor is "a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business."[26] When considering sex discrimination cases, however, courts consistently construe this exception narrowly, requiring employers to prove the existence of a reasonable factual basis for the discriminatory practice.[27] Sex discrimination[28] is permissible only when the essence of the business operation would be undermined by a failure to hire members of one sex exclusively.[29] Some courts have urged a different test, whereby an employer may utilize the bona fide occupational qualification defense to a charge of sex discrimination only when there is "reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."[30]

B. *Administrative Procedures and Litigation*

1. *Administrative Procedures*

A person alleging discrimination by an employer must generally file a timely charge[31] with the Equal Employment Opportunities Commission (EEOC) within 180

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22. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971); Weeks v. Southern Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

23. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

24. Homemakers, Inc. of Los Angeles v. Division of Indus. Welfare, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1975); Williams v. General Foods Corp., 492 F.2d 399 (7th Cir. 1974); Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971).

25. 42 U.S.C. § 2000e-2(a) (1976).

26. 42 U.S.C. § 2000e-2(e)(1) (1976).

27. *See generally* Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025, 1026 (1977). The EEOC guidelines provide that the bona fide occupational qualification exception shall be strictly construed in the area of sex. 29 C.F.R. § 1604.2(a) (1982).

28. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977). The EEOC guidelines help define sex discrimination by stating "the principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group." 29 C.F.R. § 1604.2(a)(1)(ii) (1982).

29. Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir.), *cert. denied*, 404 U.S. 950 (1981).

30. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969). *See also* Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670 (9th Cir. 1980).

31. 42 U.S.C. § 2000e-5(b) (1976). The charge must be in writing and describe, under oath, the nature of the discrimination. *Id.*

days of the violation as a condition precedent to Title VII litigation.[32] Once a charge is filed, the EEOC notifies the charged party and then conducts an investigation to determine if there is reasonable cause to believe that a violation has occurred. If the EEOC determines that a violation may have occurred, it must attempt to eliminate the practice by conference, conciliation, and persuasion.[33] A private suit by the plaintiff can be filed only after the EEOC issues notification that either (1) the EEOC is dismissing the charge, or (2) 180 days have passed since the filing of the charge and the EEOC has not filed suit or concluded a conciliatory agreement.[34] Upon receipt of the EEOC's notice to sue, the plaintiff can then file a complaint in federal district court.[35]

2. *Disparate Treatment Cases*

Employment discrimination claims are categorized as either disparate treatment or disparate impact cases.[36] Disparate treatment occurs when an employer im-

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32. 42 U.S.C. § 2000e-5(e) (1976). *See* Kryzewski v. Nashville, 584 F.2d 802 (6th Cir. 1978). If the alleged violation occurs within a state that has an enforcement agency, the state agency has exclusive jurisdiction for sixty days, and at the conclusion of that period, the plaintiff can file a charge with the EEOC. *See* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979). If the charge is filed in such a state, the plaintiff must file with the EEOC within 300 days of the alleged violation or thirty days after receiving notice that the state agency has disposed of the case, whichever comes first. 42 U.S.C. § 2000e-5(e) (1976). *See* Mohasco Corp. v. Silver, 447 U.S. 807 (1980) (pendency of state proceedings does not extend the 300 day period). For an excellent explanation and analysis of Title VII's procedural requirements, see Comment, *The Procedural Filing Requirements of Title VII in Deferral States: The Need for Legislative Action*, 43 OHIO ST. L.J. 675 (1982).

The plaintiff may not be able to commence suit unless a timely charge is filed with the EEOC. United Air Lines, Inc., v. Evans, 431 U.S. 553, 555 (1977); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973). If systematic discrimination is alleged, however, the time limitations may not apply because the violation continues as long as the discriminatory system is in effect. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 795 (4th Cir. 1971). Discriminatory promotional policies may be regarded as continuing violations. *See, e.g.*, Verzosa v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 589 F.2d 974, 977 (9th Cir. 1978); Clark v. Olinkraft, Inc., 556 F.2d 1219, 1222 (5th Cir. 1977), *cert. denied*, 434 U.S. 1069 (1977); Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n, 551 F.2d 1136, 1137 (8th Cir. 1977). *But see* Delaware State College v. Ricks, 449 U.S. 250, 257 (1980) (denial of tenure was not a continuing violation; therefore, the time limitations applied). Additionally, the present effect of a past discriminatory act cannot furnish the basis for Title VII jurisdiction in the absence of a present violation. United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977).

Filing a timely charge with the EEOC is not a jurisdictional prerequisite to suit because courts may apply equitable doctrines of estoppel, tolling, and laches whenever the facts of the case merit such consideration, thus operating to revive a claim that would otherwise be barred by a procedural technicality. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). *Compare* Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965) (plaintiff's filing suit in wrong forum tolled the statute of limitations); Fox v. Eaton Corp., 615 F.2d 716, 721 (6th Cir. 1980); Smith v. American President Lines, Ltd., 571 F.2d 102, 105 (1978); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 475 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978) *with* International Union of Elec. Radio and Mach. Workers, Local 790 v. Robbins & Meyers, Inc., 429 U.S. 229, 238 (1976) (Title VII time period is not tolled during the pendency of grievance proceedings). *See generally* Jackson & Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 GEO. L.J. 811 (1979).

33. 42 U.S.C. § 2000e-5(b) (1976). *See* EEOC v. Magnolia Elec. Power Ass'n, 635 F.2d 375, 378 (5th Cir. 1981); EEOC v. Zia Co., 582 F.2d 527, 533 (10th Cir. 1978).

34. 42 U.S.C. § 2000e-5(f)(1) (1976). The basic enforcement mechanism of Title VII is a private right of action vested in the victim of discrimination. The House Committee on the Judiciary believed that enforcement in the federal courts and not the EEOC would mean that "settlement of complaints will occur more rapidly and with greater frequency." Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 436 (1966) (citing H.R. REP. NO. 914, 88th Cong., 1st Sess., *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2515-16).

35. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973). Plaintiff has 90 days to file in federal court. 42 U.S.C. § 2000e-5(f)(1) (1976). The EEOC right to sue notice is a jurisdictional prerequisite to suit, and a premature action by plaintiff may be dismissed. *See* Gibson v. Kroger Co., 506 F.2d 647, 650 (7th Cir. 1974), *cert. denied*, 421 U.S. 914 (1974); Stebbins v. Continental Ins. Co., 442 F.2d 843, 845-46 (D.C. Cir. 1971); Cox v. United States Gypsum Co., 409 F.2d 289, 291 (7th Cir. 1969).

36. *See generally* L. MODJESKA, HANDLING EMPLOYMENT DISCRIMINATION CASES 10-27 (1980); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1-12 (1976). A variant of the typical employment discrimination case is

permissibly distinguishes between persons of comparable ability. These cases involve an employer's decision to discharge[37] or refusal to employ[38] or promote[39] a particular individual because of race, color, religion, sex, or national origin. Proof of the employer's discriminatory motive is crucial,[40] although in some cases, motive may be inferred from the mere fact of differential treatment.[41] In *McDonnell Douglas Corp. v. Green*[42] the United States Supreme Court provided guidelines for resolving disparate treatment cases. The plaintiff initially must establish a prima facie case by proving (1) she was a member of a protected class, (2) that she applied and was qualified for an available position, (3) that she was rejected, and (4) that after her rejection, the position remained open and the employer continued to receive applications from persons of complainant's qualifications.[43] The burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment practice.[44] If the employer produces a reasonable and legitimate explanation supporting the validity of the practice, the plaintiff then must demonstrate that the employer's reasons are merely a pretext for an underlying discriminatory practice.[45]

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the pattern or practice theory, under which plaintiff must prove that the employer has systematically treated specific individuals less fairly than others on the basis of an impermissible classification. Pattern or practice has been defined as including "only [situations] when the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine or of a generalized nature. . . ." "[S]ingle, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice. . . ." 110 CONG. REC. 14270 (1964) (remarks of Senator Humphrey). A pattern or practice case may, for example, establish that over a period of years only men were promoted to supervisory positions, passing over equally qualified women. *See* Kyriazi v. Western Elec. Co., 461 F. Supp. 894, 902 (D.N.J. 1978). A showing of pattern or practice allows the EEOC to bring a civil action seeking appropriate relief in an expedited hearing. 42 U.S.C. § 2000e–6(a) (1976).

37. *See, e.g.*, Brown v. A.J. Gerrard Mfg. Co., 643 F.2d 273, 276 (5th Cir. 1981) (whites warned before discharge for excessive absenteeism, but not blacks); Taylor v. Safeway Stores, Inc., 524 F.2d 263, 267 (10th Cir. 1975) (Title VII violation for black worker's discharge resulting from unfair treatment by white foreman).

38. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977) (pattern or practice action brought by the federal government against company with 6,472 employees of which only 5% were black and 4% were Spanish surnamed); United States v. County of Fairfax, 629 F.2d 932, 939 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981) (prima facie case of disparate treatment shown by applicant flow statistics demonstrating large disparities between defendant's work force and the applicant pools for blacks and women).

39. *See, e.g.*, Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1348–49 (W.D. Pa. 1977) (prima facie case established when only 5 women had tenure out of 401 faculty members, 45% of males received tenure compared to 6% of women, and during the preceding six years, only 3 women achieved tenure while 70 of their male counterparts were given tenure).

40. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Furnco Constr. Co. v. Waters, 438 U.S. 567, 577 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 (1973).

41. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977).

42. 411 U.S. 792 (1973).

43. *Id.* at 802.

44. *Id. See also* Causey v. Ford Motor Co., 516 F.2d 416 (5th Cir. 1975). In making individual employment decisions, the employer is free to weigh each person's particular talents and performance. *Id.* at 423 (quoting Pond v. Braniff Airways, Inc., 500 F.2d 161, 165–66 (5th Cir. 1974)). If the judgment of the individual is made in good faith and not corrupted by stereotypical assumptions about the abilities of certain classes of people, the employer's judgment can be sustained as a legitimate reason. *Id.* (quoting Pond v. Braniff Airways, Inc., 500 F.2d 161 (5th Cir. 1974)). In Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 (1978) the Court held that the employer need only articulate some legitimate nondiscriminatory reason for the rejection of the employee and is not required to prove absence of a discriminatory motive. In Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253–54 (1981) the Court declared that the defendant employer bears only the burden of clearly explaining the nondiscriminatory reasons for its actions. The burden of persuasion remains at all times with the plaintiff, and defendant's evidentiary obligation is limited to a burden of production, not a burden of persuasion.

45. McDonnel Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). *See also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). The plaintiff has the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. *Id.* at 256. This burden is concomitant with the plaintiff's ultimate burden of

3. *Disparate Impact Cases*

Disparate impact cases avoid the issue of discriminatory motive by focusing on facially neutral employment practices that have an adverse impact on a protected group and cannot be justified by job relatedness.[46] In *Griggs v. Duke Power Co.*[47] the Supreme Court held that employment criteria must bear a demonstrable relationship to successful performance on the job for which they are used.[48] The good faith of the employer or lack of discriminatory intent does not rescue employment practices that have a disproportionate impact on minorities.

Once the plaintiff in a discriminatory impact case makes a prima facie showing of the adverse impact, the burden is on the defendant to produce evidence of job relatedness, that is, a business necessity.[49] The employee may also rebut the employer's showing with proof that less discriminatory methods were available to achieve the employer's goal.[50]

III. *HISHON V. KING & SPALDING*

A. *Facts*

In 1972 Elizabeth Hishon graduated with honors from Columbia University School of Law and was hired as an associate by King & Spalding.[51] King & Spalding, a large law firm in Atlanta, Georgia, operates as a partnership that consists of over 100 attorneys divided approximately equally between partners and associates.[52] When Hishon joined the firm, she was the second female attorney employed by King & Spalding. Although King & Spalding was formed in 1885, at the time the complaint was filed King & Spalding had never admitted a woman to partnership.[53] King

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persuading the court that he or she has been the victim of intentional discrimination. *See, e.g.*, Paxton v. Union Nat'l Bank, 688 F.2d 552, 569 (8th Cir. 1982) (better qualifications used as a pretext for racially motivated discrimination); Sabol v. Snyder, 524 F.2d 1009, 1012 (10th Cir. 1975) (better qualifications used as pretext); Causey v. Ford Motor Co., 516 F.2d 416, 422–23 (5th Cir. 1975) (rejecting subjective decision by employer that others were better qualified); Gilmore v. Kansas City Terminal Ry. Co., 509 F.2d 48, 51 (8th Cir. 1975) (skills and experience demanded were not actually necessary for the job).

46. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125, 137 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

47. 401 U.S. 424 (1971).

48. *Id.* at 436. *See also* New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979). The employer is not restricted from attempting to reach a maximum level of efficiency. *See, e.g.*, 110 CONG. REC. 7771 (1964) (remarks of Senator Tower) ("The successful business is one with every job filled by the most competent man available."); *Id.* at 7218 (Senator Clark remarks that "[t]he employer may set his qualifications as high as he likes.") *See generally* Note, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974).

49. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); EEOC v. Greyhound Lines, Inc., 635 F.2d 188, 191 (3d Cir. 1980).

50. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Clanton v. Orleans Parish School Bd., 649 F.2d 1084, 1098 (5th Cir. 1981); Burwell v. Eastern Airlines, Inc., 633 F.2d 361, 372–73 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981).

51. Petition for Cert. at 4, Hishon v. King & Spalding, 678 F.2d 1022 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

52. Hishon v. King & Spalding, 678 F.2d 1022, 1024 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

53. Petition for Cert. at 4, Hishon v. King & Spalding, 678 F.2d 1022 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983). King & Spalding did have a female partner by the time the district court decided the case. *See* Hishon v. King & Spalding, 25 Empl. Prac. Dec. (CCH) ¶ 31,703 at 20,064 (N.D. Ga. 1980).

& Spalding had employed a female attorney, however, from 1944 until 1977 as a permanent associate.[54]

Hishon alleged that she "was induced to accept employment by King & Spalding because of the express promise and representation that she would be considered for partnership on a fair, nondiscriminatory basis upon satisfactory completion of six years of employment as an associate."[55] Hishon also alleged that "King & Spalding discriminated against [Hishon] on the basis of sex and, in considering her promotion to partnership, refused to utilize the same standards it applied to male associates who were admitted to partnership."[56] Hishon and two male associates were denied partnership in May, 1978, while other male associates were asked to join.[57] Eight months later, Hishon requested reconsideration for partnership, but in May, 1979, she was again rejected.[58] Hishon's employment subsequently was terminated because King & Spalding maintains an "up or out" policy which allows the rejected associate to remain with the firm only for such reasonable period necessary to secure other employment.[59] Hishon filed a sex discrimination complaint in federal court after receiving the EEOC right to sue notice.[60]

B. *Proceedings Below*

The district court imposed a stay on discovery of the merits, limiting the parties to discovery on the threshold jurisdictional issue.[61] The court was presented with the novel question whether law firm partnership decisions are exempt from the prohibition of discrimination in Title VII. The plaintiff proposed three legal theories for the application of Title VII: (1) partners at King & Spalding are equivalent to employees of a corporation, thereby establishing the employment context for Title VII, (2) elevation to partnership is an "employment opportunity" or a "term, condition, or privilege of employment" protected by Title VII, and (3) termination of employment resulting from the failure to make partner beause of sex discrimination is an unlawful discharge prohibited by Title VII.[62] Plaintiff moved to compel discovery on these issues, but the district court denied the motion[63] and dismissed the complaint on the ground that King & Spalding was outside the coverage of Title VII because it was

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54. *See* Listings of King & Spalding in MARTINDALE-HUBBELL LAW DIRECTORY (1944–1977); Sylvester, *Is Partnership Decision Subject to Bias Statute?*, NAT'L L.J., February 7, 1983 at 6, col. 3.

55. Petition for Cert. at 4, Hishon v.King & Spalding, 678 F.2d 1022 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

56. *Id.*

57. Hishon v. King & Spalding, 678 F.2d 1022, 1024 n.2 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

58. *Id.* at 1024. The litigants disputed the nature of the May, 1979 meeting. King & Spalding argued that the partnership voted not to reconsider Ms. Hishon for partnership and that the decision not to invite her was made in 1978. Hishon claimed that the partnership reconsidered and revoted on the partnership issue at its 1979 meeting. The importance of the date of rejection is that if the partnership decision was actually made in 1978, Hishon exceeded the 180 day filing requirement for employment discrimination suits. 42 U.S.C. § 2000e–5(e) (1976). The Eleventh Circuit never reached this issue because it found that Title VII did not apply. *See* Hishon v. King & Spalding, 678 F.2d 1022, 1024 n.3 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

59. Hishon v. King & Spalding, 678 F.2d 1022, 1024 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

60. *Id.* at 1025. *See supra* text accompanying notes 31–35.

61. Hishon v. King & Spalding, 678 F.2d 1022, 1025 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

62. *Id.* at 1026.

63. Hishon v. King & Spalding, 25 Empl. Prac. Dec. (CCH) ¶ 31,703, at 20,062 (N.D. Ga. 1980).

organized as a partnership.[64] The district court compared a law firm partnership to a marriage, concluding that the application of Title VII would resemble a statute for the enforcement of shotgun weddings:

> In a very real sense a professional partnership is like a marriage. It is, in fact, nothing less than a 'business marriage' for better or worse. Just as in marriage different brides bring different qualities into the union—some beauty, some money, and some character—so also in professional partnerships, new mates or partners are sought and betrothed for different reasons and to serve different needs of the partnership. Some new partners bring legal skills, others bring clients. Still others bring personality and negotiating skills. In both, new mates are expected to bring not only ability and industry, but also moral character, fidelity, trustworthiness, loyalty, personality and love. Unfortunately, however, in partnerships, as in matrimony, these needed, worthy and desirable qualities are not necessarily divided evenly among the applicants according to race, age, sex or religion, and in some they just are not present at all. To use or apply Title VII to coerce a mismatched or unwanted partnership too closely resembles a statute for the enforcement of shotgun weddings.[65]

In dismissing the complaint, the district court held that the associational rights of the partnership precluded law firm partnership decisions from Title VII jurisdiction.[66] The district court felt confronted with a dilemma between construing Title VII to cover partnership decisions, thereby establishing the subject matter jurisdiction for Hishon's claim, and the possibility of impingement on the right of association were Title VII found applicable to the process of selecting partners. The court resolved this dilemma by holding that the right of the defendant to freedom of association seemed clear, while the coverage of the Act seemed doubtful and obscure.[67] The court acknowledged, however, that it was "humbly aware that in reaching this conclusion it may have erred."[68]

On appeal to the Eleventh Circuit, plaintiff urged that Title VII must be given the broadest interpretation possible to effectuate its purpose—to remedy acts of discrimination.[69] A majority of the court dismissed plaintiff's appeal and held that Title VII did not apply:

> Even under the most liberal reading we cannot find the requisite congressional intent to permit Title VII's intervention into matters of voluntary association. We can conceive no set of facts which would entitle her to relief under Title VII with respect to partnership decisions. This renders dismissal of her claim proper.[70]

The majority decided that the essence of a partnership is voluntary association; individuals are free to choose with whom they will associate in the practice of law absent clear evidence of "the requisite congressional intent to permit Title VII's

64. *Id.* at 20,064.
65. *Id.* at 20,062.
66. *Id.* at 20,064.
67. *Id.*
68. *Id.*
69. Hishon v. King & Spalding, 678 F.2d 1022, 1026 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983). *See also* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).
70. Hishon v. King & Spalding, 678 F.2d 1022, 1026 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

intervention into matters of [discrimination by] voluntary association[s]."[71] The dissent, however, argued that Title VII applies to the defendant's partnership decision if plaintiff's discharge from her position as an associate was a direct consequence of an illegal, discriminatory decision by King & Spalding to refuse her admission to the partnership.[72]

IV. APPLYING TITLE VII TO PARTNERSHIP DECISIONS

The *Hishon* majority's position grants a blanket exemption from Title VII to all economic organizations operating as partnerships. This exemption perpetuates continued employment discrimination in the legal profession's prestigious positions, thereby removing a significant segment of the economy from Title VII's jurisdictional reach.[73] Deprived of Title VII protection, women, blacks, and other minorities are susceptible to discriminatory practices when they seek advancement from the entry level associate positions to the more lucrative opportunities available only to partners.

This Comment will argue further that the majority's view of the jurisdictional reach of Title VII is inconsistent with the intent of Congress. The Supreme Court has held:

> [I]n enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit *all practices* in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin . . . and ordained that its policy of outlawing such discrimination should have the 'highest priority'. . . .[74]

The Supreme Court, emphasizing that Congress did not intend to exempt the professional occupations from its prohibition on discrimination, declared: "Congress required the 'removal of artificial, arbitrary, and unnecessary barriers to employment' and *professional development* that had historically been encountered by women, blacks, and other minorities."[75] The Supreme Court's interpretation of

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71. *Id. See* Comment, *Judicial Intervention in Admission Decisions of Private Professional Associations*, 49 U. CHI. L. REV. 840, 842 (1982).

72. Hishon v. King & Spalding, 678 F.2d 1022, 1030 (11th Cir. 1982) (Tjoflat, J., dissenting), *cert. granted*, 103 S. Ct. 813 (1983).

73. The Supreme Court has observed that "some of the most powerful private institutions in the Nation are conducted in partnership form. Wall Street law firms and stock brokerage firms provide significant examples. These are often large, impersonal, highly structured enterprises of essentially perpetual duration." Bellis v. United States, 417 U.S. 85, 93–94 (1974). In 1972, there were 25,500 legal partnerships in the United States, grossing $5,911,000,000 in the $10,938,000,000 legal industry. By 1977, there were 29,200 partnerships, the legal profession was an 18.7 billion dollar industry, and partnerships accounted for approximately $10,093,000,000 of the total amount. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 185, Chart No. 311 (103d ed. 1982–83).

74. Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 763 (1976) (emphasis added) (citations omitted).

75. Connecticut v. Teal, 457 U.S. 440, 447 (1982) (emphasis added) (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)). In 1972 Congress amended Title VII to include academic institutions within its coverage. During the Congressional debate, Congress specifically considered and rejected a proposal to exempt physicians and surgeons from Title VII jurisdiction. Senator Javits spoke in opposition to the proposed exemption, declaring:

> [T]his amendment would go back beyond decades of struggle and of injustice, and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion—just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain—and thus lock in and fortify the idea that being a doctor or a surgeon is just too good for members of a minority, and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them.

118 CONG. REC. 3802 (1972) (statement of Senator Javits). It seems clear, therefore, that Congress never intended to exclude the professional occupations from the coverage of Title VII.

congressional intent was adopted by the Seventh Circuit in *Kamberos v. GTE Automatic Electric, Inc.*[76] when it held that the defendant employer had violated Title VII by refusing to hire the plaintiff for a corporate attorney position. The defendant's refusal to hire was based solely on the applicant's gender; thus the court was able to use Title VII to strike down discriminatory hiring practices in a professional employment context.[77] Indeed, even the judiciary has been subject to the jurisdictional reach of Title VII. In *Goodwin v. Circuit Court of St. Louis County*[78] the federal district court held that the county court engaged in sex discrimination when the presiding judge of its juvenile court division transferred a female hearing officer to a less prestigious staff attorney position.[79] The judge transferred the woman after observing that "things aren't going to run smoothly around here until we get rid of these goddamn women."[80] The federal court denied judicial immunity under anti-discrimination legislation.

The *Hishon* majority rejected the Supreme Court's interpretation of the intended jurisdictional reach of Title VII and placed on the plaintiff the burden of proving from the legislative history that Congress specifically intended to cover partnership decisions. Unable to clearly discern evidence of the "requisite congressional intent,"[81] the majority presumed that Congress intended to insulate partnership decisions by law firms and other matters of voluntary association from Title VII's prohibitions on discrimination. The viewpoint of the majority inexplicably ignores the presumption that Title VII comprehensively applies to all employment opportunities unless a specific exemption exists. Courts often liberally construe remedial legislation for jurisdictional purposes. The Supreme Court has declared that because Title VII was "intended to be broadly inclusive"[82] the lower federal courts "must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate."[83]

In *Hishon* the EEOC supported the applicability of Title VII to a law firm's decision to form a partnership.[84] The majority, however, was unconvinced by the EEOC's support for the appellant's position. The Supreme Court has declared that "[w]hen faced with a problem of statutory construction, this Court [has shown] great deference to the interpretation given the statute by the officers or agency charged with its administration."[85] Similarly, in *Griggs v. Duke Power Co.*[86] the Supreme Court

76. 603 F.2d 598 (7th Cir. 1979).

77. *Id.* at 601. Other federal courts have held that Title VII applies to a law firm's hiring of associates. *See* Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 518 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974); Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 126 (S.D.N.Y. 1977); Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4 (S.D.N.Y. 1975).

78. 30 Fair Empl. Prac. Cas. (BNA) 1375 (E.D. Mo. 1982).

79. Goodwin v. Circuit Court of St. Louis County, 30 Fair Empl. Prac. Cas. (BNA) 1375, 1379 (E.D. Mo. 1982).

80. *Id.*

81. Hishon v. King & Spalding, 678 F.2d 1022, 1026 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

82. County of Washington v. Gunther, 452 U.S. 161, 170 (1981).

83. *Id.* at 178.

84. The EEOC filed an amicus brief with the Eleventh Circuit supporting appellant's position. Hishon v. King & Spalding, 678 F.2d 1022, 1025 n.6 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

85. Udall v. Tallman, 380 U.S. 1, 16 (1965). *See also* Williams v. General Foods Corp., 492 F.2d 399, 408 (7th Cir. 1974).

86. 401 U.S. 424 (1971).

held that the administrative interpretation of Title VII by the EEOC is entitled to great deference.[87] Congress created the EEOC as the administrative agency empowered to effectuate the national policy against discrimination.[88] The EEOC is responsible for enforcing, interpreting, and administering Title VII; therefore, the principle that courts should respect an agency's contemporaneous construction of a disputed provision of its enabling statute[89] should have persuaded the majority to adopt the EEOC's interpretation of Title VII.[90]

A. *Title VII and Law Firms*

Discriminatory employment practices at the professional level have become subject to increasing attack, and law firms have been no exception as litigants and courts struggle to determine the scope of Title VII.[91] Although Title VII does not contain any explicit exceptions for law firms, the *Hishon* majority created an exception despite the Supreme Court's admonition that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent."[92]

Other courts have refused to allow law firms to escape Title VII jurisdiction. In *EEOC v. Rinella & Rinella*[93] a federal district court declared that "since the primary objective of Title VII is the elimination of major social ills of job discrimination, discriminatory practices in professional fields are not immune from attack."[94] In *Lucido v. Cravath, Swaine & Moore*[95] another federal district court confronted the same issue as the *Hishon* court—the alleged discriminatory denial of partnership to a

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87. *Id.* at 433–34.

88. 42 U.S.C. § 2000e–4 (1976).

89. Power Reactor Dev. Co. v. International Union of Electricians, 367 U.S. 396, 408 (1961).

90. County of Washington v. Gunther, 452 U.S. 161, 177–78 (1981); EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981); Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971).

91. *See generally* Bardeen, *The Legal Profession: A New Target for Title VII?*, 55 CAL. ST. B.J. 360 (1980); Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982); Paone & Reis, *Effective Enforcement of Federal Nondiscrimination Provisions in the Hiring of Lawyers*, 40 S. CAL. L. REV. 615 (1967); Stacey, *Subjective Criteria in Employment Decisions Under Title VII*, 10 GA. L. REV. 737 (1976); Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 WM. & MARY L. REV. 45 (1979); Note, *Tenure and Partnership as Title VII Remedies*, 94 HARV. L. REV. 457 (1980); Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 MICH. L. REV. 282 (1978); Note, *Self Defense for Women Lawyers: Enforcement of Employment Rights*, 4 U. MICH. J.L. REF. 517 (1971).

92. Andrus v. Glover Constr. Co., 446 U.S. 608, 616–17 (1980); *See also* Continental Casualty Co. v. United States, 314 U.S. 527, 533 (1942). Title VII does enumerate specific exemptions from the definition of employer. The term employer does not include:

> (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in Section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under Section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. § 2000e(b) (1976). Although Congress could have exempted partnerships from Title VII jurisdiction, it refused to do so. Further evidence of Congress' desire for Title VII to be all-inclusive was its specific rejection of a special exemption for physicians. *See supra* note 75.

93. 401 F. Supp. 175 (N.D. Ill. 1975).

94. *Id.* at 180. See also Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 521 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974).

95. 425 F. Supp. 123 (S.D.N.Y. 1977).

law firm associate. On the basic question of Title VII jurisdiction, the court concluded that Congress had defined discrimination broadly to include the entire scope of the working environment within the protective ambit of the Act.[96]

A prerequisite to the applicability of Title VII is either that an employer-employee relationship exist or the person has applied for employment.[97] The Title VII definition of "employer" encompasses three requirements: (1) a person,[98] (2) engaged in an industry affecting commerce,[99] and (3) having fifteen or more employees.[100] A law firm such as King & Spalding would be subject to the provisions of Title VII because it meets the jurisdictional criteria of an employer.[101] Since Title VII defines "employee" as an individual employed by an employer,[102] an associate in a law firm qualifies as an employee.[103]

Although the establishment of an employer-employee relationship is a jurisdictional prerequisite to a Title VII employment discrimination suit, the plaintiff must still address the issue whether Title VII applies to the decision of a law firm to deny partnership status to an associate. Hishon alleged three bases for jurisdiction—partners as employees, partnership as a term, condition or privilege of employment, and discriminatory termination.[104] The resolution of this jurisdictional issue requires a delicate balancing between the interest of society in prohibiting discrimination, particularly when that discrimination denies important social and economic benefits, and the right of the law firm partnership to select its members without governmental interference.

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96. *Id.* at 126.

97. 42 U.S.C. § 2000e-2(a) (1976). *See* Kyles v. Calcasieu Parish Sheriff's Dep't, 395 F. Supp. 1307, 1310 (W.D. La. 1975).

98. A "person," as defined by the statute, includes individuals, partnerships, associations, and corporations. 42 U.S.C. § 2000e(a) (1978).

99. "Commerce" is defined broadly as trade, traffic, commerce, transportation, transmission, or communication between states, 42 U.S.C. § 2000e(g) (1976), and "industry affecting commerce" includes any activity or business in commerce in which a labor dispute would hinder or obstruct commerce. 42 U.S.C. § 2000e(h) (1976). *See* EEOC v. Rinella & Rinella, 401 F. Supp. 175, 182 (N.D. Ill. 1975) (dynamics inherent in a general law practice necessarily involve the practice in interstate commerce).

100. 42 U.S.C. § 2000e(b) (1976).

101. King & Spalding consistently has ranked among the largest 200 law firms in the United States. In 1979 King & Spalding ranked 97th, in 1980, 106th, in 1981, 98th, and in 1982, 115th. *The Top 200 Law Firms*, NAT'L L.J., September 13, 1982 at 14, 16, 18–19, September 20, 1982 at 13–16, October 6, 1980, at 32–37, October 13, 1980, at 34–38. King & Spalding had more lawyers in 1980 (102) than the number of employees in 98% of all other businesses. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS—UNITED STATES, Table 1B (1977). King & Spalding has more lawyers than 92% of the businesses in the United States that employ 15 or more people and therefore meets the jurisdictional employee minimum. *Id.* Even if partners are left out of the total number of employees, King & Spalding is still larger than 77% of the businesses covered by Title VII. *Id.*

102. 42 U.S.C. § 2000e(f) (1976). *See, e.g.*, McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). This is the common federal statutory definition for "employee." *Cf.* H.R. REP. No. 914 pt. 1, 88th Cong., 1st Session 27 (1963).

103. In *EEOC v. Rinella & Rinella*, 401 F. Supp. 175 (N.D. Ill. 1975) the law firm had attempted to argue that associates of the firm were independent contractors, not employees. Had the law firm been able to establish that the associates were not employees, it could have escaped Title VII applicability under the fifteen employee jurisdictional requirement. The court rejected the law firm's argument by holding that associates were employees regardless of their independence and that the professional fields of employment are not exempt from Title VII. *Id.* at 179–80.

104. *See supra* text accompanying note 62.

1. *Owner or Employee?*

Hishon argued that the size and complexity of King & Spalding resembled a corporation rather than a true partnership and therefore its partners should be classified as employees and not owners.[105] She alleged that the adoption of a written partnership agreement expressly altered the firm's character from a traditional common-law partnership to the skeletal structure of a corporation.[106] Hishon urged that the partnership agreement gave King & Spalding the principal attributes of incorporation, including (1) perpetual existence, (2) the "King & Spalding" trade name, which does not represent the name of any of its living partners, (3) centralized management and control by a committee that is the equivalent of a corporate board of directors, and (4) a limitation on each partner's ownership interest in the assets of the firm to the amount of his or her capital account.[107] The thrust of her argument was that since the firm essentially functioned as a corporation, Title VII should apply because a partnership decision is analogous to a promotion within the corporation.[108]

A partnership is "[a] voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be proportional sharing of the profits and losses between them."[109] Under Georgia state law, "[a] partnership may be created either by written or parol contract."[110] King & Spalding meets these partnership definitions. Moreover, partnership theory[111] is not the only method potentially available to prove that the partners functioned as employees.[112]

For Title VII purposes, "Congress probably intended to treat the partnership as an entity similar to a corporation rather than as an aggregate of the individual partners."[113] Whether a partnership is to be regarded as an entity is governed by the particular question before the court.[114] The entity theory describes the partnership as separate and distinct from its individual members.[115] Hishon used this theory, alleg-

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105. Hishon v. King & Spalding, 678 F.2d 1022, 1026 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

106. *Id.*

107. *See* Petition for Cert. at 5, Hishon v. King & Spalding, 678 F.2d 1022 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

108. Hishon v. King & Spalding, 678 F.2d 1022, 1026 n.7 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

109. BLACK'S LAW DICTIONARY 1009 (rev. 5th ed. 1979). *See also* 1 ROWLEY ON PARTNERSHIP 35 (2d ed. 1960) (partnership is "the relation existing between two or more individuals or associations of individuals, who have associated themselves together for the purposes of sharing the profits and losses arising from a use of capital, labor or skill in some common transaction or series of transactions"). *See also* UNIFORM PARTNERSHIP ACT § 6, 6 U.L.A. 22 (1914) (describing partnership as ". . . an association of two or more persons to carry on as co-owners a business for profit").

110. GA. CODE ANN. § 75-1-1 (1981).

111. *See* J. CRANE & A. BROMBERG, LAW OF PARTNERSHIP § 3 (1968). *See also* Jensen, *Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?*, 16 VAND. L. REV. 377 (1963).

112. *See infra* text accompanying notes 125–32 (discussing the economic realities test).

113. Note, *Tenure and Partnership as Title VII Remedies*, 94 HARV. L. REV. 457, 462 (1980). *See also* J. CRANE & A. BROMBERG, LAW OF PARTNERSHIP § 3 at 25 ("[t]here is no doubt of the ability of legislatures to treat partnerships as entities . . . by defining operative words like 'person' . . . to include partnerships").

114. Jensen, *Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?*, 16 VAND L. REV. 377, 384 (1963).

115. J. CRANE & A. BROMBERG, *supra* note 113, at 17. The defendant, in its brief for the trial court, admitted that as a partnership King & Spalding has an existence apart from its individual members. *See* Hishon v. King & Spalding, 25 Empl. Prac. Dec. (CCH) ¶ 31,703, at 20,061 (N.D. Ga. 1980).

ing that King & Spalding's written partnership agreement, perpetual duration, centralized management, and limitations on a partner's share of the assets to his invested capital were all attributes of a corporation rather than a true partnership.[116]

The entity theory was endorsed by the Supreme Court in *Bellis v. United States*[117] when the Court declared that a partnership has "an established institutional identity independent of its individual partners."[118] The Court thus prevented the invocation of a fifth amendment privilege by the partner on behalf of the law firm partnership by holding that the law partnership and a partner possessed individual identities. The Court found factual support for the theory that the partnership was an independent entity in the nature of the organization:

> [T]he partnership represented a formal institutional arrangement organized for the continuing conduct of the firm's legal practice. . . . The firm maintained a bank account in the partnership name, had stationary using the firm name on its letterhead, and, in general, held itself out to third parties as an entity with an independent institutional identity.[119]

King & Spalding undoubtedly engages in identical conduct, and the court's rationale is therefore relevant to the question presented in *Hishon*.

A reasonable interpretation of *Bellis* is that the availability of constitutional or statutory protections "should not turn on an insubstantial difference in the form of the business enterprise."[120] Similarly, a court should not shield a law firm from Title VII jurisdiction by relying on the particular form of business organization that the law firm utilizes. A significant trend among law firms is to organize as professional corporations for tax purposes,[121] and every state has laws allowing professional associations to conduct their business affairs as a corporation rather than as the more traditional partnership.[122] All employment decisions made by a professional corporation should be subject to Title VII because all the attorneys are employees of the corporation,[123] and the particular business form an organization uses should be irrelevant to the jurisdictional application of Title VII.

Although the majority in *Hishon* recognized that large law partnerships possess many attributes common to corporate forms of business, it refused to accept the conclusion that a large, impersonal partnership should be treated on parity with corporations for Title VII purposes.[124] The economic realities test, however, may allow the determination that a law firm partner is the equivalent of an employee

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116. Petition for Cert. at 12, Hishon v. King & Spalding, 678 F.2d 1022 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

117. 417 U.S. 85 (1974).

118. *Id.* at 95. *See also* Armstrong v. Phinney, 394 F.2d 661, 663 (5th Cir. 1968) (rejecting the theory that partnership is an aggregate of self-employed individuals and applying the entity theory to hold that, for tax purposes, a partnership was the "employer" of a 5% partner).

119. Bellis v. United States, 417 U.S. 85, 95–97 (1974).

120. The quoted language is from *id.* at 100–01. *See also* Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 MICH. L. REV. 282, 290 (1978).

121. *See generally* Reimer, *Professional Corporations: An Analysis*, 62 MASS. L.Q. 151 (1977).

122. 9 STAND. FED. TAX REP. (CCH) ¶ 5943.02, at 66,753–56 (1930). *See also* Note, *Supra* note 113, at 463.

123. I PROFESSIONAL CORPORATIONS GUIDE (P-H) ¶ 3060 (1976).

124. Hishon v. King & Spalding, 678 F.2d 1022, 1026 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

without forcing the court to recognize the entity theory of partnership. The economic realities test suggests that the term "employee" when used in social and labor legislation should be interpreted according to the purpose of the legislation.[125] If the objectives of the Act prohibiting discriminatory practices are met by treating partners as employees, and if the incidents of partnership are not inconsistent with that treatment, Title VII should apply.[126] The Supreme Court has applied the economic realities test to other federal legislation, reasoning that the term "employee" should be construed in a comprehensive manner to accomplish the purpose of the legislation, thereby rejecting attempts to narrow the scope of the legislation by use of conventional limitations on the concept of the employer-employee relationship.[127]

In *NLRB v. Hearst Publications, Inc.*[128] the Court used the economic realities test to hold that a newsboy was an employee of a newspaper for purposes of the National Labor Relations Act. The Court emphasized that:

> [W]hen the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections. Congress recognized those economic relationships cannot be fitted neatly into the containers designated "employee" and "employer" which an earlier law had shaped for different purposes. . . .[129]

Recognizing the need for a flexible interpretation of the statutory language so that the goals of the Act could be fulfilled, the Court also declared:

> [T]he broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.[130]

In *United States v. Silk*[131] the Court confirmed its adoption of the economic realities test by holding that the terms "employment" and "employee" were to be construed to further the policies underlying the applicable federal statute. The Court, confronted with a problem of statutory interpretation regarding the applicability of the Social Security Act to common law independent contractors, held:

> As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a consider-

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125. 1 C. LARSON, LAW OF WORKMEN'S COMPENSATION § 43.41 (1980).

126. Note, *supra* note 120, at 290. *See also* Paone & Reis, *Effective Enforcement of Federal Nondiscrimination Provisions in the Hiring of Lawyers*, 40 S. CAL. L. REV. 615, 633 (1967).

127. Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28 (1961) (Fair Labor Standards Act); United States v. Silk, 331 U.S. 704 (1947) (Social Security Act); NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944) (National Labor Relations Act).

128. 322 U.S. 111 (1944).

129. *Id.* at 128.

130. *Id.* at 129 (footnotes omitted).

131. 331 U.S. 704 (1947).

> able degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.[132]

Title VII similarly should be interpreted so that it can accomplish the purposes for which it was enacted—elimination of employment discrimination. King & Spalding argued that the court should not adopt the economic realities test to define the term "employee" but rather should use the common dictionary meaning as suggested by Senator Clark during Senate debate in reference to the term employer.[133] The dictionary, however, provides a compound definition of employee: (1) "one employed by another usually in a position below the executive level and usually for wages," or (2) "any worker who is under wages or salary to an employer and who is not excluded by agreement from consideration as such a worker."[134] If the law firm partner is assumed to be an executive, then arguably he is not an employee under the first part of the definition. The second part of the definition, however, may operate to include law firm partners if they draw a salary from the law firm employer. Partners would not be considered employees only if the partnership agreement excluded them from this classification.

The obvious problem with using this definition is that its inherent rigidity limits a court's ability to apply it effectively to the varying circumstances provided by each case. The term should have a flexible meaning so that it can be interpreted in a manner that will further the aims of Title VII. Title VII's broad definition of employee as an "individual employed by an employer"[135] dictates that the applicability of the Act should be determined by the economic facts. The facts in *Hishon* are that King & Spalding operates under a trade name as a continuously existing enterprise employing over 100 attorneys.[136] The partners resemble employees more than owners of the business, and the statutory language should not be manipulated to obfuscate the economic realities of the situation, thereby allowing law firms to avoid the jurisdictional reach of Title VII.

Moreover, the Supreme Court has held that part ownership of a business does not preclude one's classification as an employee for federal employment legislation purposes. In *Goldberg v. Whitaker House Cooperative, Inc.*,[137] the Court, confronted with a provision of the Fair Labor Standards Act of 1938, emphasized that "ownership" and "employee" status were not mutually exclusive:

> There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship. If members of a trade union bought stock in their corporate employer, they would not cease to be employees within the conception of the Act. . . . We fail to see why a member of a cooperative may not also be an employee of the

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132. *Id.* at 712.

133. Hishon v. King & Spalding, 678 F.2d 1022, 1027 n.9 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983). Senator Clark's remarks may be found at 110 CONG. REC. 7216 (1964). Senator Clark did not endeavor, however, to define "employee" according to its common dictionary meaning, nor did anyone else.

134. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 743 (1971).

135. 42 U.S.C. § 2000e(f) (1976).

136. *See supra* note 101 and text accompanying note 107.

137. 366 U.S. 28 (1961).

> cooperative. In this case the members seem to us to be both "members" and "employees." It is the cooperative that is affording them the "opportunity to work, and paying them for it. . . ."[138]

Although recognizing the substantial precedents advocating the adoption of the economic realities test, the *Hishon* majority refused to accept the conclusion that the economic reality of the relationship between a partner and a large law firm is one of employment. The majority rejected the economic realities test as the sole inquiry in favor of an analysis formulated by Judge Tjoflat in the Fifth Circuit case *Calderon v. Martin County*.[139] The *Hishon* majority adopted the premise of the Fifth Circuit that the status of "an employee under Title VII is a question of federal . . . law . . . to be ascertained through consideration of the statutory language of the Act, its legislative history, existing federal case law, and the particular circumstances of the case at hand."[140] After finding little guidance in the statutory language and legislative history of Title VII, the *Hishon* majority turned to existing federal case law, including analysis under the economic realities test and traditional agency and partnership principles.[141]

The Court's discussion of federal case law was limited to a brief analysis of one case. The Court never adequately applied the economic realities test despite its claim that this analysis was included in its examination of existing federal case law. To support its decision that partners are not employees, the majority adopted the reasoning of *Burke v. Friedman*.[142] Applying traditional partnership principles, the Seventh Circuit held in *Burke* that the partners of an accounting firm were not employees for the purposes of establishing the employee jurisdictional requirements of Title VII. Although the jurisdictional issues were different in *Hishon* and *Burke*,[143] the majority opinion had little trouble extrapolating the principle that partners are not employees for Title VII purposes.

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138. *Id.* at 32. *See also* Dunlop v. Carriage Carpet Co., 548 F.2d 139, 142–43 (6th Cir. 1977). When construing the term "employee" under the Fair Labor Standards Act, the court rejected traditional common law concepts and held that guidance for defining the term was provided by decisions interpreting the term as used in the Social Security Act, 42 U.S.C. §§ 301 to 1397f (1976), the National Labor Relations Act, 29 U.S.C. §§ 151 to 187 (1976), and Title VII, 42 U.S.C. §§ 2000e–1 to 2000e–17 (1976). The court went on to declare that the Act's definitions of its terms have been construed liberally to effectuate the broad policies and intentions of Congress. *Id.* at 144.

139. 639 F.2d 271 (5th Cir. 1981).

140. Hishon v. King & Spalding, 678 F.2d 1022, 1027 (quoting Calderon v. Martin County, 639 F.2d 271, 272–73 (5th Cir. 1981)), *cert. granted*, 103 S. Ct. 813 (1983). The *Calderon* case dealt with the classification of "employee" for purposes of establishing whether the plaintiff was a qualified litigant under Title VII. *See* Hishon v. King & Spalding, 678 F.2d 1022, 1027 n.10 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983). Although the *Hishon* majority admitted that the question it faced was whether the partners could be considered employees and not whether Ms. Hishon was an employee, the majority nevertheless found that the jurisdictional nature of the inquiry made the *Calderon* test appropriate. The validity of the *Calderon* test is suspect, however, because there is no dispute that Hishon qualified as an employee under Title VII. *See supra* text accompanying notes 101–03. The use of this test in *Hishon* also is ironic because the *Calderon* test was formulated by J. Tjoflat, who dissented in *Hishon* and urged the court to adopt the economic realities test.

141. Hishon v. King & Spalding, 678 F.2d 1022, 1027 (11th Cir. 1982) (citing Donovon v. Tehco, Inc., 642 F.2d 141 (5th Cir. 1981)); Lutcher v. Musicians Union Local 47, 633 F.2d 880 (9th Cir. 1980); Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979); Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977)), *cert. granted*, 103 S. Ct. 813 (1983).

142. 556 F.2d 867 (7th Cir. 1977).

143. King & Spalding clearly meets the jurisdictional requirements of Title VII, whether or not the partners are considered employees. *See supra* text accompanying note 101. Holding that partners are the equivalent of employees so that they could then be counted in the determination whether a firm has the requisite number of employees for statutory

The final component of the *Calderon* test requires an examination of the particular circumstances of the case. It is here that the Court should have applied the economic realities test, recognizing that the facts of this case mandated a statutory construction that would further the national policy of nondiscrimination. The Fifth Circuit has urged that "Title VII's definition of 'employee' is not restrictive, [and that] the existence of such a status for a certain individual must turn on the facts of each case."[144] Despite this view, the *Hishon* majority narrowly interpreted the term "employee" and held that because King & Spalding operated as a true partnership, the partners could not be employees. The firm files taxes as a partnership and has a lengthy partnership agreement outlining procedures for profit and loss distribution, withdrawal, dissolution, and other matters. The majority, relying on this evidence, held that the law firm was a voluntary association of lawyers for the purpose of practicing law as joint venturers.[145]

The majority's narrow interpretation of the term "employee" as used in Title VII violates the principles of statutory construction that the federal courts have followed when analyzing federal employment legislation. In *Cannon v. University of Chicago*[146] the Supreme Court found an implied private remedy available under Title IX. The Court rejected the lower court's strict construction of the remedial aspect of the statute because in its evaluation of the legislative history the lower court had neglected to take account of the contemporary legal context within which the Act was passed.[147] The Court then declared that "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [any] unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them."[148] The *Hishon* majority similarly misinterpreted the legislative history because it failed to attribute sufficient importance to the Supreme Court decision that had applied the economic realities test when defining the term "employee" in federal legislation prior to the enactment of Title VII.[149] Undoubtedly, Congress was aware that there were three Supreme Court cases decided prior to the enactment of Title VII that adopted fluid definitions of the term "employee" so that the underlying purposes of the statute could be attained. The presumption, therefore, arises that Congress intended to adopt the Court's construction of the term. Arguably, Congress' use of the identical term ("employee") in Title VII, without debate over its intended meaning, signifies congressional acceptance of the Supreme Court's fluid interpretation of the term. Congress undoubtedly was familiar with the common-law definition of an employment relationship that included factors such as

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jurisdictional limits would result in an expansion of Title VII's jurisdictional reach to cover smaller organizations that may not presently be covered. In light of the strong national policy against discrimination, however, the courts should not be reluctant to broaden the inclusive effect of the legislation. This policy is countered only by the consideration that the smaller a partnership, the more that Title VII applicability will resemble a "shotgun wedding."

144. Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977) (citing McClure v. Salvation Army, 460 F.2d 553, 557 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972)).

145. Hishon v. King & Spalding, 678 F.2d 1022, 1028 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

146. 441 U.S. 677 (1979).

147. *Id.* at 698–99.

148. *Id.* at 699.

149. *See supra* text accompanying notes 128–38.

control exercised by employer over employee (including time, place, and duration of employee's work and amount of payment), and the employer's discharge powers. Title VII's definitions, however, require a more liberal definition of employee than the traditional common-law analysis.[150] Although a law firm partner may not be a common-law employee, good statutory construction and the social and economic reality of the lawyer's status should determine the application of federal anti-discrimination legislation.[151]

Furthermore, the broad, inclusive language of Title VII is similar to other social and labor statutes passed by Congress and interpreted by the courts. Courts have held that "[u]se of the same language in various enactments dealing with the same general subject matter [in this case, employment], is a strong indication that the statutes should be interpreted to mean the same thing."[152] The remedial nature of Title VII should pose no obstructions to an interpretation of its terms that parallels that given to identical terms in other federal employment legislation. The terms "employee" and "employment" consistently have been given an expansive construction designed to eliminate the evils Congress sought to remedy by passing the legislation.

The dissent in *Hishon* urged the court to examine the reality of the events alleged by the plaintiff and not to be concerned with the "conventional garb in which those events are cloaked."[153] The economic reality of the relationship between a partner and a large institutional law firm essentially is one of employment. A partner does not participate in the profits as a return on invested capital but rather is compensated based upon his total earnings derived from his labor. By weighing the important purpose of Title VII and avoiding a narrow common law concept of partnership that prefers form over function, the *Hishon* majority logically should have reached the conclusion that partners of law firms are employees for Title VII purposes.

The narrow view of "employee" adopted by the *Hishon* majority already has been specifically rejected by the Sixth Circuit in *EEOC v. First Catholic Slovak Ladies Association*.[154] The court was confronted with the issue whether people acting concurrently as members of the Board of Directors and officers of a benevolent association should be considered employees under the Age Discrimination in Employment Act (ADEA).[155] The district court held that the directors/officers were not employees protected by the ADEA because they assumed office by an elective pro-

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150. *See* Paone & Reis, *Effective Enforcement of Federal Nondiscrimination Provisions in the Hiring of Lawyers*, 40 S. CAL. L. REV. 615, 634 (1967).

151. *Id.* at 639.

152. Hargrave v. OKI Nursery, Inc., 646 F.2d 716, 720 (2d Cir. 1980). *See also* Northcross v. Board of Educ., 412 U.S. 427, 428 (1973).

153. Hishon v. King & Spalding, 678 F.2d 1022, 1030 (11th Cir. 1982) (Tjoflat, J., dissenting), *cert. granted*, 103 S. Ct. 813 (1983).

154. 694 F.2d 1068 (6th Cir. 1982).

155. 29 U.S.C. §§ 621–634 (1976 & Supp. III 1979). The proscription of discrimination found in the Age Discrimination in Employment Act traces Title VII's language, except that age is substituted for the impermissible classification. *Compare* 29 U.S.C. § 623(a) (1976) *with* 42 U.S.C. § 2000e–2(a) (1976). *See also supra* text accompanying note 25. Additionally, the Act's definition of employee as "an individual employed by an employer," 29 U.S.C. § 630(f) (1976), and employer as "a person engaged in an industry affecting commerce," 29 U.S.C. § 630(b) (1976), are identical to Title VII's definitions. *See supra* text accompanying notes 100–01.

cess and because directorships have traditionally been viewed as employer rather than employee positions.[156] The district court argued by analogy to *Hishon* and emphasized that an election to the Board of Directors, like an election to the partnership of a law firm, involves an internal decision on who should govern and set broad policies for the organization.[157]

The Sixth Circuit reversed, holding that the district court interpreted the term "employee" too narrowly.[158] The court declared that when interpreting the term "employee" in social welfare legislation, courts have used a broad definition so as to effectuate the stated purposes of the statutes.[159] The court rejected the analogy to *Hishon* that the defendant espoused, and declared that a determination whether an individual is an employee and therefore covered by the federal antidiscrimination legislation should not center on the label which the organization has chosen to give the position.[160] The court examined the true status of the individuals and found that they performed traditional employee duties and drew salaries as employees. The court held that election to the Board of Directors did not preclude these individuals from being classified as employees for the purposes of the Act. Similarly, the *Hishon* court should have examined the true nature of the jobs performed by the partners at King & Spalding. Although the partners are theoretically responsible for directing the firm, a hierarchical structure exists that delegates authority to various committees responsible for the overall operation of the firm. An individual partner's participation is obviously limited by the size of the firm and the scope of the operations. The partner's working day is predominantly occupied with traditional employee duties. If the court had accepted these facts and applied a liberal construction to the terms of Title VII so as to effectuate the stated national policy prohibiting discrimination, the court logically would have reached the conclusion that law firm partners can be considered employees for Title VII purposes.

2. *Partnership as a Term, Condition or Privilege of Employment*

Hishon alleged that King & Spalding expressly promised she would be considered for promotion to partnership on a nondiscriminatory basis after six years and an invitation to join the partnership would be extended to her in return for satisfactory work as an associate,[161] and that this promise was a "term, condition or privilege of employment"[162] or an "employment opportunity"[163] protected under Title VII.[164] Under this theory, the court need not equate partners with employees to bring law

156. EEOC v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1068, 1069 (6th Cir. 1982).

157. *Id.* at 1070.

158. *Id.*

159. *Id.* The court's examples of social welfare legislation were the Age Discrimination in Employment Act, Title VII, the Fair Labor Standards Act, and the National Labor Relations Act.

160. *Id.*

161. Hishon v. King & Spalding, 678 F.2d 1022, 1028 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

162. 42 U.S.C. § 2000e-2(a)(1) (1976).

163. 42 U.S.C. § 2000e-2(a)(2) (1976).

164. *See supra* text accompanying note 25. Hishon v. King & Spalding, 678 F.2d 1022, 1028 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

firm partnership decisions within Title VII's jurisdictional reach. Even if partners are not employees, the transitional stage between an associate, who clearly retains employee status, and a partner would still be subject to Title VII's nondiscrimination requirements.

The "term, condition or privilege" language has been held to prohibit discrimination in considering employees for promotion.[165] The fundamental inquiry, therefore, is whether an advancement to partnership status is the equivalent of a promotion. The partnership offer is similar to promotion because it is offered as an inducement to join the firm and as a reward for demonstrable efficiency and effectiveness during the period in which one is an associate.[166]

Substantial precedent supports the proposition that a right of an employee to be considered for promotion on a nondiscriminatory basis is covered by federal employment legislation whether or not the employee would be covered after the promotion.[167] Thus, even assuming that Title VII may not apply to partners within law firms, the protection it affords employees would remain unaffected in the process of partner selection. In *NLRB v. Bell Aircraft Corp.*[168] an individual was denied a promotion to the position of foreman because of discrimination by the employer. Although the position of employee was covered by the National Labor Relations Act (NLRA), the position of foreman did not fall under the auspices of the Act.[169] The Second Circuit nevertheless found discrimination under the NLRA, holding that:

> [a]t the time the discrimination took place he [plaintiff] was clearly a protected employee, and his prospects for promotion were among the conditions of employment. The Act protected him so long as he held a nonsupervisory position, and it is immaterial that the protection thereby afforded was calculated to enable him to obtain a position in which he would no longer be protected.[170]

In *Golden State Bottling Co., Inc. v. NLRB*[171] an employee was scheduled for promotion when his employer engaged in an unfair labor practice resulting in a wrongful discharge. The employer argued that back pay stemming from the wrongful discharge should terminate on the date the employee was to have been promoted because the new position was excluded from the coverage of the National Labor Relations Act. The Supreme Court rejected the contention of the defendant, stating:

> It is undisputed that when [the employee] was discriminatorily discharged he was an ordinary employee. The Act's remedies are not thwarted by the fact that an employee who

165. *See, e.g.*, United Transp. Union Local No. 974 v. Norfolk & W. Ry. Co., 532 F.2d 336, 340 (4th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437, 440–42 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974).

166. *See* White, *Women in the Law*, 65 MICH. L. REV. 1051, 1106 n.91 (1967); Note, *Self Defense for Women Lawyers: Enforcement of Employment Rights*, 4 U. MICH. J.L. REF. 517, 531 (1971).

167. Golden State Bottling Co., Inc., v. NLRB, 414 U.S. 168, 188 (1973); NLRB v. Bell Aircraft Corp., 206 F.2d 235, 237 (2d Cir. 1953); Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 128 (S.D.N.Y. 1977).

168. 206 F.2d 235 (2d Cir. 1953).

169. *See* National Labor Relations Act, 29 U.S.C. § 152(3) (1976) (definition of employee does not include foremen or other supervisory personnel).

170. NLRB v. Bell Aircraft Corp., 206 F.2d 235, 237 (2d Cir. 1953).

171. 414 U.S. 168 (1973).

> is within the Act's protections when the discrimination occurs would have been promoted or transferred to a position not covered by the Act if he had not been discriminated against.[172]

These cases demonstrate that federal employment legislation applies to an employment situation in which an employee is promoted to a position that is not covered by the statute. The rationale underlying the NLRA's exclusion of managerial personnel from the Act's provisions is that once a person becomes part of management, his or her susceptibility to unfair labor practices is diminished. The same rationale can be extended to Title VII if it is assumed that partners are excluded from coverage of the Act. Once the lawyer achieves partnership status, it is assumed that any discriminatory practices that may occur will not substantially impede his or her professional status or livelihood. Under both acts, however, the transition or promotional process from a "covered" employment status to a potentially "excluded" employment status is a protected occurrence.

Unlike the NLRA, however, Title VII jurisdiction extends to managerial and supervisory personnel, thereby encompassing at least some of the functions performed by law firm partners. The coverage under Title VII, therefore, is significantly broader than under the NLRA, making the argument for coverage even stronger. A discriminatory denial of partnership should be subject to Title VII because the associate is clearly within the protective ambit of the Act. The applicability of the Act to the partners themselves is irrelevant because it is the transitional phase between associate and partner that is subject to Title VII scrutiny.

A law firm should not escape Title VII jurisdiction because of the partial ownership by the partners of the organization. Partial ownership has never been a jurisdictional defense to federal antidiscrimination legislation. In *Pettway v. American Cast Iron Pipe Co.*[173] a group of black employees brought suit alleging denial of promotional opportunities to the Board of Operatives of the company. The Board of Operatives was composed of nonsupervisory personnel elected by the employees to advise company management on matters affecting the welfare of the employees and to serve as a conduit for communication between management and employees. The Board of Operatives, in conjunction with a management board, controlled all the outstanding stock of the company as trustees for the employees. The court found that by virtue of this ownership interest, election to the Board of Operatives was a valuable term, condition or privilege of employment within the express coverage of Title VII, and the court thus ordered the discrimination terminated.[174]

Similarly, in *Bonilla v. Oakland Scavenger Co.*,[175] the company followed a shareholder preference plan that restricted ownership of company shares to members of the immediate families of the founders of the company. An employee could not buy shares without the approval of all the other shareholders, and the Board of

172. *Id.* at 188.
173. 494 F.2d 211 (5th Cir.), *reh'g denied en banc*, 494 F.2d 1296 (5th Cir. 1974).
174. *Id.* at 265.
175. 697 F.2d 1297 (9th Cir. 1982).

Directors maintained custody and possession of all shares and assumed title upon the death of the shareholder.[176] Defending a suit alleging discrimination against minority nonshareholder employees, the company argued that Title VII had no application to discrimination in the sale of corporate stock.[177] The Ninth Circuit rejected this contention, stating: "Since the company ties preferential wages, hours, and job assignments to ownership of its stock, a shareholder preference plan constitutes a condition of employment subject to the mandate of Title VII."[178] The court noted further that although the company's organization "closely entangles stock ownership and employment privilege, . . . the predominant characteristics are those of employment."[179]

A decision more closely analogous to *Hishon* is *Lucido v. Cravath, Swaine & Moore*,[180] in which the district court denied a motion to dismiss a complaint alleging unlawful discharge of an associate. The plaintiff argued that the law firm engaged in discriminatory practices by preventing, in violation of Title VII, his promotion to partner. The court held that under the facts of the case, the opportunity to become a partner in the law firm was a term, condition or privilege of employment and an employment opportunity within the meaning of Title VII.[181] A clear employer-employee relationship existed between the plaintiff and the law firm, and discrimination in a promotional opportunity during that relationship was thus covered by Title VII.[182] The court bypassed the issue whether partners in law firms are within the jurisdiction of Title VII by declaring that the opportunity to be promoted to a position not itself covered by Title VII does not mean that discrimination in that promotion cannot be prohibited under Title VII.[183]

The argument that promotion to partnership is a privilege of employment has received substantial support from the commentators:

> [T]o say that the prospect of becoming a partner is not one of the attributes or "privileges" of employment with a law firm is to ignore reality. . . . [T]he prospect of . . . partnership and the added compensation which it is expected to bring can offset other detriments of the job, such as comparatively low beginning pay or undesirable working conditions. Thus, . . . the opportunity to compete for a partnership position [is] one of the "privileges" of employment of which the act speaks.[184]

The offer of partnership status is a privilege sought by associates throughout their apprenticeship period.[185] The additional compensation concomitant with significant job security surely establishes the inherent privilege to be gained by partnership in a

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176. *Id.* at 1300.

177. *Id.* at 1302.

178. *Id.*

179. *Id.*

180. 425 F. Supp. 123 (S.D.N.Y. 1977). Lucido argued that Cravath had impermissibly discriminated against him based on national origin and religion.

181. *Id.* at 127.

182. *Id.* at 128.

183. *Id. See supra* text accompanying notes 167–72.

184. White, *Women in the Law*, 65 MICH. L. REV. 1051, 1106 (1967); Note, *Self Defense for Women Lawyers: Enforcement of Employment Rights*, 4 U. MICH. J.L. REF. 517, 531 (1971).

185. *See* Note, *Tenure and Partnership as Title VII Remedies*, 94 HARV. L. REV. 457, 461 (1980).

law firm. To deny this privilege of employment on the basis of sex is to discriminate in a manner that is prohibited by the Act.

The literal language of the statute assumes special significance if a law firm maintains an up or out policy. By hinging continued employment with the firm on an associate's acceptance to partnership, the firm explicitly establishes partnership as a condition of employment.[186] The employment of an associate with the firm is conditional and remains that way until the partnership decision is made. It is only with a partnership offering that an employee's vulnerability is largely eliminated and job security is more or less assured.

The majority opinion in *Hishon* recognized the premise that an "opportunity" can include promotion to a position beyond that of an employee covered by Title VII. The majority refused, however, to extend the meaning of "employment opportunities" to encroach upon the decision of individuals to voluntarily associate in a business partnership.[187] The majority distinguished the cases relied upon by Hishon, stating that their holdings should be narrowly construed according to the individual fact pattern of each case. The majority disposed of *Lucido* by respectfully disagreeing with the decision of the court and observing that the discussion of discrimination in partnership promotion was merely dicta.[188]

3. *Up or Out?*

The final argument by Hishon for applying Title VII to law firm partnership decisions was that she had been denied employment opportunities as a result of the firm's implementation of its up or out policy. Hishon alleged that denial of partnership adversely affected her employment status by resulting in her termination.[189] Hishon's termination was the factor that motivated the dissent's declaration that Title VII should apply to this situation; Judge Tjoflat urged that "when the partnership decision inextricably and inevitably *is* a decision whether to terminate employment, I would hold that Title VII applies."[190] The harsh consequences of denying partnership to an associate mandates that a Title VII analysis is appropriate when that associate alleges discriminatory treatment.

Lucido v. Cravath, Swaine & Moore[191] is analogous to *Hishon* in that in each case the defendant maintained an up or out policy.[192] The *Lucido* court held that "[t]he Cravath policy . . . makes the opportunity to be promoted to partner 'a term,

186. *See* Paone & Reis, *Effective Enforcement of Federal Nondiscrimination Provisions in the Hiring of Lawyers*, 40 S. CAL. L. REV. 615, 640 (1967).

187. Hishon v. King & Spalding, 678 F.2d 1022, 1028 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

188. *Id.* at 1029.

189. Termination of employment that adversely affects the status of an employee is subject to Title VII restrictions. 42 U.S.C. § 2000e-2(a)(1) (1976). *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397 (9th Cir. 1978); Jacobs v. Martin Sweets Co., 550 F.2d 364 (6th Cir. 1977), *cert. denied*, 431 U.S. 917 (1978); Holthaus v. Compton & Sons, Inc., 514 F.2d 651 (8th Cir. 1975); Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974).

190. Hishon v. King & Spalding, 678 F.2d 1022, 1030 (11th Cir. 1982) (Tjoflat, J., dissenting) (emphasis in original), *cert. granted*, 103 S. Ct. 813 (1983).

191. Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 128 (S.D.N.Y. 1977).

192. *Id.*

condition, or privilege of employment' . . . within the meaning of . . . Title VII."[193] The Eleventh Circuit rejected the analysis of the *Lucido* court, characterizing the termination argument by Hishon as an attempt to establish Title VII jurisdiction "through the back door."[194] Although the majority cited *Lucido* for the proposition that discriminatory termination alone may be a cause of action for unlawful discharge under Title VII, the majority went on to declare that "when the termination is a result of the partnership decision, it loses its separate identity and must fall prey to the same ill-fate as [the] original attempt [by the plaintiff] to apply Title VII to partnership decisions."[195] Despite the harsh consequences of a law firm's up or out policy, the resulting discharge provides the weakest grounds for extension of Title VII to partnership decisions. If the discharge is solely the result of the partnership decision, then Hishon must prove that the partnership decision itself, rather than its effect, was discriminatory since the Supreme Court has held that the present effect of a past act of discrimination is not actionable.[196] In *Delaware State College v. Ricks*[197] the plaintiff alleged that discrimination motivated the College not only in denying him tenure, but also in terminating his employment after his one-year contract extension had expired.[198] The Court held that the only alleged discrimination occurred at the time the tenure decision was made, even though the effects of the denial of tenure—the eventual loss of a teaching position—did not occur until later.[199] For Hishon to maintain a claim of discriminatory discharge, therefore, she would have to allege and prove that the manner in which her employment was terminated differed discriminatorily from the manner in which the law firm terminated other associates who also had been denied partnership status.

B. *Problems in Application—Judicial Hesitation*

The majority opinion in *Hishon* reflects the attitudes of some courts that are hesitant to apply Title VII to law firms or other upper level positions.[200] Four themes dominate the arguments of those opposed to the application of Title VII to law firm partnership decisions—the sensitive nature of law firm discovery, the constitutionally based right of association, the effect of state laws governing business entities, and the inherent difficulty of judicial analysis of subjective selection criteria for promotion. Although courts have found these issues problematic in Title VII litigation, they are insufficient, either individually or in the aggregate, to limit the jurisdictional reach of Title VII in professional level employment discrimination cases.

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193. *Id.*

194. Hishon v. King & Spalding, 678 F.2d 1022, 1029 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

195. *Id.*

196. United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977).

197. 449 U.S. 250 (1980).

198. *Id.* at 257.

199. *Id.* at 258.

200. The term "upper level position" refers to a socio-economic status achieved by some members of our society through the particular occupation they pursue. Included in this group are most white collar employees, as well as professionals such as doctors and lawyers. Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 948 (1982).

1. *Discovery*

When preparing for litigation, any information within the knowledge of a party or under that party's control[201] that is relevant to legal issues or likely to lead to relevant information is discoverable.[202] If a Title VII action is brought against a law firm for discriminatory denial of partnership, courts must define the limits of the discovery to be allowed.[203] Broad discovery of the law firm's operation may impinge upon individual privacy,[204] and may lead to forced settlement of claims by a defendant unwilling to risk having its internal affairs subject to public review.[205] To proceed with a legitimate complaint, however, a plaintiff must have access to some of the records of the law firm.[206] The court must balance these competing interests so that frivolous suits are discouraged and legitimate complaints are allowed to proceed.

The *Hishon* majority recognized the sensitivity of the discovery issue when plaintiff sought to obtain the partnership agreement of King & Spalding. The district court imposed a stay on discovery of the merits of the case and restricted initial discovery to information needed for the threshold jurisdictional issue.[207] The court granted the request by King & Spalding to supply an edited version of its agreement as well as an edited version of its answers and objections to numerous interrogatories. The court then placed all of the information under seal to avoid unnecessary disclosure.[208] The request by the plaintiff for additional discovery was objected to by King & Spalding and denied by the court.[209]

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201. United States v. Pilot Freight Carriers, Inc., 54 F.R.D. 519, 522 (M.D.N.C. 1972).

202. Marshall v. Electric Hose & Rubber Co., 68 F.R.D. 287, 295 (D. Del. 1975) (information with possible relevance is discoverable). *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1135–1146 (1976). FED. R. CIV. P. 26(b)(1) allows discovery of material that is relevant and admissible at trial, but also of information that "appears reasonably calculated to lead to the discovery of admissible evidence."

203. The trial court has considerable discretion in determining whether to compel discovery. *See* FED. R. CIV. P. 26, 33; Blum v. Gulf Oil Co., 597 F.2d 936, 938 (5th Cir. 1979); Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 864 (9th Cir. 1977); Burns v. Thiokol Chem. Corp., 483 F.2d 300, 306 (5th Cir. 1973).

204. *See, e.g.*, Baer v. Standard Oil Co., 13 Fair Empl. Prac. Cas. (BNA) 657, 659 (N.D. Cal. 1976) (defendant employer not required to answer interrogatories that may infringe employees' constitutional rights of privacy and free exercise of religion).

205. Note, *supra* note 120, at 303 n.123.

206. The leading case allowing broad discovery is Burns v. Thiokol Chem. Corp., 483 F.2d 300 (5th Cir. 1973). The appellate court analogized a private plaintiff's suit to the broad discovery powers of the EEOC, since extreme prejudice may result if the plaintiff is denied access to necessary information. *Id.* at 305.

207. Hishon v. King & Spalding, 678 F.2d 1022, 1025 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983). In proceedings before the district court, Hishon had sought to inquire into such matters as the amount of capital contribution required of the defendant's new partners, the amount of the firm's surplus and the interest of the various partners therein, the division of the partnership points among each class of partners, and the amount of income derived therefrom by each. *See* Hishon v. King & Spalding, 25 Empl. Prac. Dec. (CCH) ¶ 31,703, at 20,062 (N.D. Ga. 1980). The court declared that this material would make interesting reading for King & Spalding's competitors and that the information sought would make no difference in the case's outcome. Thus, the information was concluded to be of no concern to plaintiff. *Id.*

208. Hishon v. King & Spalding, 25 Empl. Prac. Dec. (CCH) ¶ 31,703, at 20,062 (N.D. Ga. 1980). The EEOC participated as amicus curiae in the district court and submitted an amicus brief supporting the plaintiff's position. The EEOC requested access to all discovery, but the court denied the request. *See* Hishon v. King & Spalding, 678 F.2d 1022, 1025 n.6 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983). Other courts have demonstrated similar concern over public disclosure of discovered documents. In *Southern Methodist Univ. Ass'n v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979) the court ordered the plaintiff to produce its current membership list (plaintiff was an association of women law students), but defendant's counsel could not communicate the answers to anyone other than the two named partners in the firm who were handling the case. The court held that this ruling struck a sensible balance between the law firm's need to defend the suit and the plaintiff's desire to avoid the purportedly adverse consequences of revealing information with respect to its membership. *Id.* at 714. An analysis of when protective orders should be issued is presented in Koster v. Chase Manhattan Bank, 93 F.R.D. 471, 474–83 (S.D.N.Y. 1982).

209. Hishon v. King & Spalding, 678 F.2d 1022, 1025–26 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

Discovery for a Title VII action brought by a plaintiff against a law firm can include internal firm memoranda, depositions of partners and associates, and various statistical information concerning the partnership and hiring practices of the firm.[210] In *Blank v. Sullivan & Cromwell*,[211] a discriminatory hiring practices action, the court ordered the law firm to answer interrogatories concerning its practices regarding the advancement of associates to partnership status. The interrogatories required the firm to identify all female associates, state the average length of service with the firm of all associates who were offered partnerships in the firm, and indicate any reasons why partnership had not been offered within the average length of service.[212] The firm also had to identify female attorneys who were offered an opportunity to become partners, state the dates on which they started working and the dates on which they received partnership offers, and indicate their areas of specialization.[213] The court decided that any general information on the labor hierarchy of defendant might be reflective of restrictive or exclusionary hiring practices within the contemplation of the statute.[214] The test formulated by the court is "whether the information requested is so unrelated to plaintiffs' claim that women are discriminated against by defendant on account of sex that it cannot be said to be 'relevant' within the expansive meaning of that term in Rule 26."[215]

In *Lucido v. Cravath, Swaine & Moore*[216] the court was confronted with sensitive discovery issues concerning confidential documents relating to the law firm. The law firm submitted interrogatories to the plaintiff requesting information regarding oral statements upon which he had relied to support the allegations of his complaint.[217] Upon receipt of Lucido's answers, which covered eighty-six oral statements and were 104 pages in length, Cravath moved for a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure to put the answers under seal.[218] Cravath had initially moved to put all the interrogatory answers under court seal, but submitted instead a revised order to the court covering approximately one-half of the oral statements enumerated in plaintiff's answers.[219] The court agreed that some protection was necessary because the statements included charges of ethnic bigotry,

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210. Note, *supra* note 120, at 303 n.123.

211. 16 Fair Empl. Prac. Cas. (BNA) 87 (S.D.N.Y. 1976).

212. *Id.* at 87 n.1. *See also* Bardeen, *The Legal Profession: A New Target for Title VII?*, 55 CAL. ST. B.J. 360, 361 (1980).

213. 16 Fair Empl. Prac. Cas. (BNA) 87 n.1 (S.D.N.Y. 1976).

214. *Id.* at 88 (citing McDonnell Douglas Corp., v. Green, 411 U.S. 792, 804–05 (1973) and Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094, 1100–01 (2d Cir. 1974)).

215. *Id. See also supra* note 202.

216. 425 F. Supp. 123 (S.D.N.Y. 1977).

217. *Id. See also* Bardeen, *The Legal Profession: A New Target for Title VII?*, 55 CAL. ST. B.J. 360, 361 (1980).

218. Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 125 (S.D.N.Y. 1977). FED. R. CIV. P. 26(c) provides in pertinent part:

> Upon motion by a party . . ., and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (5) that discovery be conducted with no one present except persons designated by the court; . . . (7) that . . . confidential . . . commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelope to be opened as directed by the court.

219. Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 126 (S.D.N.Y. 1977).

lack of intelligence, laziness, and unethical practices, thereby impugning the professional qualifications, personal values, and character of attorneys in the firm.[220] Although none of the information was confidential business information, significant potential injury to personal and professional reputations warranted the issuance of a protective order.[221]

Courts have proceeded cautiously when confronted with requests for discovery of sensitive law firm documents. The concern of the courts for the privacy of the parties should be tempered, however, in light of the fact that documents of a law firm may not be any more sensitive than other business documents that have been extracted from Title VII litigants. The courts must balance carefully the need of a business entity to maintain confidentiality against the interests of the plaintiff in proceeding with a legitimate Title VII claim. The courts in the *Lucido* and *Blank* cases were not completely convinced that law firm documents required complete secrecy. These courts protected the privacy of the firm while allowing plaintiffs sufficient access to the information necessary to prepare their case. The *Hishon* court should have been more liberal in its weighing of the requests of plaintiff and the objections of defendant to discovery. Hishon undoubtedly was hindered by the narrow scope of discovery imposed by the court and was thus denied the opportunity to optimally prepare her case.[222]

2. *Right of Association*

The most frequent argument raised against applying Title VII to law firm partnership decisions is that judicial interference in selection of a partner would impermissibly impinge upon the constitutional rights of privacy and freedom of association.[223] The majority opinion in *Hishon* endorsed this theory when it stated that Title VII should not encroach upon decisions of individuals to associate voluntarily in a business partnership.[224] The right of association argument is supported by the concurring opinion of Justice Goldberg in *Bell v. Maryland*,[225] concerning discrimination in places of public accommodation:

> Indeed, the constitutional protection extended to privacy and private association assures against the imposition of social equality. . . . Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race.[226]

The district court in *Hishon* further observed that although many organizations have

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220. *Id.*

221. *Id.* at 127.

222. *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 962 (1982).

223. *See* Defendant's Brief in Support of its Motion to Dismiss the Complaint at 15–19, Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977); Hishon v. King & Spalding, 25 Empl. Prac. Dec. (CCH) ¶ 31,703 (N.D. Ga. 1980). *See also* Note, *supra* note 113, at 468.

224. Hishon v. King & Spalding, 678 F.2d 1022, 1028 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

225. 378 U.S. 226 (1964).

226. *Id.* at 313 (Goldberg, J., concurring).

abolished their discriminatory practices, they have done so voluntarily and not because of any recognition that the law requires it.[227]

Although the district court in *Hishon* based its rejection of Title VII jurisdiction primarily on a freedom of association theory, the court was able to find minimal precedential support for this right in a business or commercial partnership context. The district court relied on the majority opinion by Justice Harlan in *NAACP v. Alabama*,[228] which, after recognizing the right of association, stated that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . . [S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[229]

The district court then analogized a professional partnership to the marriage institution, the central unifying characteristic being the freedom to select a mate who will bring the most ideal qualities into the relationship.[230] The court concluded this analogy by urging that applying Title VII to coerce a mismatched or unwanted partnership too closely resembles a statute for the enforcement of shotgun weddings.[231] Using this marriage analogy, the district court found support for its freedom of association notion in *Griswold v. Connecticut*:[232]

> This law [relating to contraceptives], however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation. . . . In *NAACP v. Alabama* we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. . . . The right of "association" like the right of belief is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means.[233]

The fundamental principle underlying the freedom of association is that although discrimination in the selection of social partners or associates may be regarded by some to be deplorable, society cannot impose business or social relationships on individuals.[234]

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227. Hishon v. King & Spalding, 25 Empl. Prac. Dec. (CCH) ¶ 31,703, at 20,062 (N.D. Ga. 1980).

228. 357 U.S. 449 (1958).

229. *Id.* at 460–61.

230. Hishon v. King & Spalding, 25 Empl. Prac. Dec. (CCH) ¶ 31,703, at 20,062 (N.D. Ga. 1980). *See also supra* text accompanying note 65. The marriage analogy was not the only one conceived by the court. The court also argued that an election to partnership in a law firm was comparable to a "promising young engineer working for the Chevrolet Division of General Motors who is elected to the board of directors of that corporation." *Id.* at 20,064. The court believed that because Title VII does not apply to the election of corporate directors, it should not apply to partnership promotions. Nevertheless, the promotion process of General Motors for the career path of the engineer would be within the ambit of Title VII protection, and therefore, the associate in a law firm should be entitled to equivalent safeguards. The comparison between an associate in a law firm making partner and an engineer becoming a director in one of the largest corporations in the world is not one that can be logically made; and thus, the analogy is of negligible value in determining Title VII application.

231. Hishon v. King & Spalding, 25 Empl. Prac. Dec. (CCH) ¶ 31,703, at 20,062 (N.D. Ga. 1980).

232. 381 U.S. 479 (1965).

233. Hishon v. King & Spalding, 25 Empl. Prac. Dec. (CCH) ¶ 31,703, at 20,062–63 (N.D. Ga. 1980) (citing Griswold v. Connecticut, 381 U.S. 479, 482–83 (1965)).

234. Note, *supra* note 120, at 317. *See generally* Buchanan, *Federal Regulation of Private Racial Prejudice: A Study of Law in Search of Morality*, 56 IOWA L. REV. 473, 530 (1971); Sengstock & Sengstock, *Discrimination: A Constitutional Dilemma*, 9 WM. & MARY L. REV. 59, 63 (1967).

In *Hishon* the majority extended the right of association beyond its traditional application by holding that partners in a law firm possess a cognizable legal right of association that transcends the prohibitions of Title VII. The freedom to associate is a first amendment right recognized by the Supreme Court in *NAACP v. Alabama*.[235] It allows an individual "to engage in association for the advancement of beliefs and ideas . . . ."[236] The Court has deemed it necessary to protect this right because "it promotes and may well be essential to the '[e]ffective advocacy of both public and private points of view, particularly controversial ones' that the First Amendment is designed to foster."[237] The most analogous case to a law firm's associational rights is *NAACP v. Button*,[238] in which the NAACP sued to enjoin enforcement of a Virginia statute that regulated the legal profession. The NAACP was engaged in solicitation of legal business to fulfill its primary purpose of eliminating racial discrimination. The NAACP claimed that the state law prohibiting solicitation by attorneys infringed the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress.[239] The Court held that the NAACP as a corporation could assert the rights on its own behalf, and that the activities of the NAACP and its legal staff are modes of expression and association protected by the first and fourteenth amendment which the state could not prohibit.[240] Influenced by the purpose of the NAACP's solicitation, the Court allowed the organization to assert these rights. The Court held:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.[241]

Thus, it is significant that the Court's acceptance of the lawyer's freedom of association was attributable to the organization's efforts to overcome discrimination.

The freedom of association, however, was never intended to be used to overcome antidiscrimination legislation. In *Runyon v. McCrary*[242] black parents brought section 1981 actions against private schools in Virginia after their children had been denied admission because the schools were not integrated.[243] The Court held that the racial discrimination practiced by the schools violated section 1981.[244] The Court then proceeded to analyze whether the application of section 1981 would violate the

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235. 357 U.S. 449 (1958).

236. *Id.* at 460.

237. Runyon v. McCrary, 427 U.S. 160, 175 (1976) (citing NAACP v. Alabama, 357 U.S. 449, 460 (1958)). In Buckley v. Valeo, 424 U.S. 1 (1975), the Court was faced with deciding the constitutionality of parts of the Federal Election Campaign Act of 1971. The Court declared that the freedom of association included the "freedom to associate with others for the common advancement of political beliefs and ideas." *Id.* at 15 (citing Kasper v. Pontikes, 414 U.S. 51, 56 (1973)).

238. 371 U.S. 415 (1962).

239. *Id.* at 428.

240. *Id.* at 428–29.

241. *Id.* at 429.

242. 427 U.S. 160 (1976).

243. 42 U.S.C. § 1981 provides in pertinent part that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ."

244. Runyon v. McCrary, 427 U.S. 160, 172 (1976).

constitutionally protected rights of association and privacy. Acknowledging that there is a first amendment right encompassing a freedom of association, the Court assumed that parents have a right to send their children to educational institutions that promote the belief that racial segregation is desirable.[245] The Court went on to observe, however, that "it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle."[246] The Supreme Court has emphasized that "'the Constitution . . . places no value on discrimination' . . . and although '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protection.'"[247] The freedom to associate is solely a derivative of other constitutional rights; no express constitutional language guarantees its existence. Allowing partners in law firms to discriminate in a manner theoretically legitimated by a right of association thus ignores the admonition of the Supreme Court that the eradication of discrimination takes precedence over a tangential right that is without concrete constitutional foundation.

Moreover, the Supreme Court has taken a narrow view toward extending the right of association beyond the traditional first amendment rights of freedom of speech and petition from which it is derived. In *Heart of Atlanta Motel v. United States*[248] the Court was confronted with the issue of whether Title II of the Civil Rights Act of 1964 applied to the tourism industry. The defendant had argued that its clientele preferred to stay in an all-white motel, and thus, that if Title II applied, the discrimination would be terminated but the business would suffer severe financial losses. The Court held that Title II's prohibition on discrimination or segregation on the basis of race, color, religion or national origin by places of public accommodation did not impinge upon the constitutional guarantees of due process or personal liberty. The Court declared that a motel operator has "no right to select its guests as it sees fit, free from governmental regulation."[249] A similar prohibition should apply to law firms under Title VII; the right of a law firm to select its partners is not a right that is or should be constitutionally protected from governmental regulation.

Even in cases arising in a noneconomic context, the Court has balanced the alleged associational rights against the purposes served by the contested regulation. In *Village of Belle Terre v. Boraas*[250] a group of college students challenged a zoning

245. *Id.* at 176.

246. *Id.* (emphasis in original).

247. *Id.* (citing Norwood v. Harrison, 413 U.S. 455, 469–70 (1973)). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 702 (1976).

248. 379 U.S. 241 (1964).

249. *Id.* at 259. The Court was unmoved by the motel operator's argument of potential adverse economic consequences. The Court declared this of no consequence because that a "member of the class which is regulated may suffer economic losses not shared by others . . . has never been a barrier" to federal antidiscrimination legislation. *Id.* at 260 (citing Bowles v. Willingham, 321 U.S. 503, 518 (1944)). A federal district court recently held that the United States Jaycees could not exclude women members because the state had demonstrated its commitment to prohibiting discrimination in access to public accommodation on the basis of sex. United States Jaycees v. McClure, 534 F. Supp. 766, 771 (D. Minn. 1982). The State's interest was compelling, thereby overcoming any right to associate that the Jaycees had urged. The court rejected the Jaycees' contention that it would be destroyed by allowing women to become members, declaring that there was nothing to prohibit young men from enjoying the benefits of the Jaycees if women became members. *Id.* at 772. *Cf.* Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 129 (S.D.N.Y. 1977).

250. 416 U.S. 1 (1974).

ordinance that restricted land use to one-family dwellings. The ordinance's definition of "family" permitted occupancy by an unlimited number of persons that were related by blood, marriage, or adoption, but precluded occupancy of a dwelling by more than two unrelated persons. The Court rejected the students' argument that the ordinance infringed their fundamental constitutional rights of privacy and association, holding that economic and social legislation alleged to be violative of the Equal Protection Clause will be upheld merely if "'reasonable, not arbitrary,'" and if it "bears 'a rational relationship to a [permissible] state objective.'"[251] In *Moore v. City of East Cleveland*[252] the Court retreated from this position only minimally when it held that a housing ordinance permitting only certain categories of related persons to live together was an intrusive regulation of family life and therefore infringed the freedom of personal choice in marriage and family matters protected by the Constitution: "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by [the Constitution]."[253] Nevertheless, the Court refused to adopt a per se rule of invalidity of laws infringing familial associational rights. The *Moore* decision acknowledged that the statute involved therein could have survived constitutional attack had it been shown to serve an important governmental interest.[254] If the Court is, under certain circumstances, willing to override the associational right for cases arising out of family relationships, certainly it should be willing to do so in the context of the selection of one's business partners,[255] if the important governmental interest in eradicating employment discrimination is served thereby.

Although the Supreme Court has recognized the individual's associational rights in the context of social institutions, the lower courts have followed the reluctance of the Supreme Court to extend this right beyond political, social or religious organizations.[256] In *Lucido* the court expressly declared that the first amendment privacy or associational rights do not exist for a commercial, profit-making business organization.[257] The Supreme Court has declared that the right of privacy protects activities "relating to marriage, procreation, contraception, family relationships, child rearing and education."[258] Despite the district court's dubious analogy in *Hishon* between a law firm partnership and marriage, cases recognizing these first amendment rights refer to social organizations, and not business organizations.[259]

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251. *Id.* at 8 (citing Reed v. Reed, 404 U.S. 71, 76 (1971)).

252. 431 U.S. 494 (1977).

253. *Id.* at 499 (citing Cleveland Bd. of Educ. v. Lafleur, 414 U.S. 632, 639–40 (1974)).

254. *Id. See also* Linscott v. Miller Falls Co., 440 F.2d 14, 18 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971).

255. Note, *supra* note 120, at 317.

256. *See supra* note 237. *See also* Cousins v. Wigoda, 419 U.S. 477, 491 (1975) (state's interest not sufficient to compel seating of one of two delegations at 1972 Democratic National Convention, since qualifications of delegation are a matter for internal determination by a party protected by associational rights of a political party); Barnett v. Rodgers, 410 F.2d 995, 1000 (D.C. Cir. 1969) (need compelling state interest and no alternative means in order to impede Muslim prisoners' observance of dietary creed).

257. Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 129 (S.D.N.Y. 1977).

258. Roe v. Wade, 410 U.S. 113, 152–53 (1973) (citations omitted).

259. *Compare* Griswold v. Connecticut, 381 U.S. 479, 483–86 (1965); NAACP v. Alabama, 357 U.S. 449, 462–63 (1958), *with* Runyon v. McCrary, 427 U.S. 160, 176 (1976); Bellis v. United States, 417 U.S. 85, 92–95 (1974).

The denial of partnership operates in the realm of economic opportunities; thus, it is outside the purview of traditional associational rights.[260]

> Because the Court in the past 30 years has allowed the state and federal government wide latitude in restricting the business activities and because a law firm is essentially a business activity, albeit one with strong personal, social, and perhaps even political overtones, it is unlikely that a law firm would be successful in arguing that it has a constitutionally protected right to deny partnership to a female.[261]

Privacy and associational rights were designed to insulate an individual's social relationships from governmental interference, and allowing law firm partners to use these rights to discriminate in an economic context denigrates their fundamental purpose.

But even if a court found that a law firm partnership did deserve first amendment associational rights, the application of Title VII to the partnership selection process would not violate those rights. Title VII would not prevent the partners from associating for political, social, and economic goals, nor prohibit them from joining or forming associations.[262] The partners are still able to select business associates, but their selection cannot be based on an impermissible classification. The discretionary, subjective judgments involved in the partnership promotion decisions are not limited by the application of Title VII except to preclude consideration of factors of race, color, religion, sex or national origin in the promotion process.[263] The liberty of action of the law firm partnership is constrained only to meet the purposes of the Act. Title VII simply grants a qualified individual an equal opportunity to be considered for partnership.

In summation, the Supreme Court has never extended privacy and associational rights derived from the first amendment beyond a social or familial relationship, and discriminatory selection systems of law firm partnerships are therefore outside the purview of traditional associational rights applications. This form of discrimination limits access to economic benefits and restricts, simply on the basis of sex or some other arbitrary classification, the freedom of an individual to pursue a chosen vocation.[264] Partnerships engaging in discrimination surely are not deserving of constitutional protection. Moreover, even if a court found that the right of association extended to an economic relationship such as a law firm partnership, the strong

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260. Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449 (1974):

> If there is a private right to discriminate, it is derived from the notion implicit in the privacy decisions—that at some point no government may intrude into the private affairs of men and women. . . . [That] point is reached, if at all, when the discriminatory act involves few people and is only marginally related to market place concerns and the basic resources of our society.

Id. at 523.

261. White, *Women in the Law*, 65 MICH. L. REV. 1051, 1107 n.93 (1967).

262. Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 129 (S.D.N.Y. 1977). *See also* Runyon v. McCrary, 427 U.S. 160, 176 (1976); United States v. International Longshoremen's Ass'n, 460 F.2d 497, 501 (4th Cir.), *cert. denied*, 409 U.S. 1007 (1972). *See supra* text accompanying notes 242–47.

263. Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 129 (S.D.N.Y. 1977). *See* Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 521 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974).

264. Note, *supra* note 120, at 317.

national policy against discrimination would be a sufficiently compelling state interest to override any associational rights urged by a partnership to justify discriminatory selection practices.[265]

3. *Effect of State Laws*

The application of Title VII to partnership promotion decisions may conflict with state laws if the state requires unanimous consent of all partners as a prerequisite to partnership status.[266] Title VII takes precedence, however, over any state laws that permit employment practices prohibited by Title VII.[267] Under the Supremacy Clause[268] and the preemption doctrine, Title VII overrides the state partnership laws to the extent necessary to fulfill the purposes of the federal statute.[269] The *Lucido* court expressly recognized this principle when it declared that were state laws requiring the unanimous consent of all partners for entry inconsistent with the application of Title VII, the federal statute would prevail.[270]

4. *The Subjective Selection Process*

The impact of Title VII on law firm partnerships may turn on whether a court feels sufficiently competent to scrutinize subjective employee evaluation processes.[271] Promotion to partnership has been analogized to university appointments and tenure, on the basis of the subjective assessments required in the decision making process.[272] These professional level appointments and promotions typically involve discretionary choices by the employer and subjective evaluations that examine competence, personal interests, personality, integrity, motivation, and ability to work with others. This discretion by the decision makers allows the expression of personal bias and invites selection of candidates resembling those doing the selecting.[273] Despite the potential abuses of a discretionary system, some courts adamantly refuse

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265. *Id.* at 316. The strong national policy against sex discrimination has been used by the courts in other employment discrimination cases to reject constitutional arguments. In Russell v. Belmont College, 554 F. Supp. 667 (M.D. Tenn. 1982), the district court applied the Equal Pay Act to a Baptist controlled college, rejecting the college's argument that application of the Act would violate either the free exercise clause or the establishment clause.

266. *See* UNIFORM PARTNERSHIP ACT § 18(g), 6 U.L.A. 213 (1914) ("No person can become a member of a partnership without the consent of all partners.")

267. 42 U.S.C. § 2000e–7 (1976).

268. U.S. CONST. art. VI, § 2.

269. *See* Note, *supra* note 113, at 476.

270. Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 129 n.6 (S.D.N.Y. 1977).

271. *See generally* Stacy, *Subjective Criteria in Employment Decisions Under Title VII*, 10 GA. L. REV. 737 (1976); Comment, *Subjective Employment Criteria and the Future of Title VII in Professional Jobs*, 54 U. DET. J. URB. L. 165 (1976); Note, *Title VII and Employment Discrimination in "Upper Level" Jobs*, 73 COLUM. L. REV. 1614 (1973).

272. *See* Bardeen, *supra* note 91, at 362–63; Note, *supra* note 113.

273. Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 996 (1982). One New York law firm embroiled in an employment discrimination suit attempted to describe and defend its procedure for selecting associates as follows:

> The record of the applicant is, of course, a starting point, but in every case the final decision is also predicated upon subjective factors such as sincerity, appearance, poise, and the ability to understand and articulate conceptual matters. . . . Only during the interview at the Firm is an evaluation of the intangible factors discussed above possible. Thus, the initial impression of the applicant is of necessity a lasting one. Much depends upon the "chemistry" which occurs between the applicant and the interviewers. It is impossible to

to intervene when the employment relationship involves highly subjective selection criteria.[274]

Although Title VII does not prohibit the use of subjective criteria,[275] courts have criticized the protection of these criteria in deciding employment discrimination claims for lower level positions.[276] In *Albemarle Paper Co. v. Moody*[277] the Supreme Court criticized a subjective performance rating system because there was no way to determine whether the criteria actually considered were sufficiently related to the company's interest in placing the best qualified people in the jobs. The criterion of success—who is doing a better job—was "extremely vague and fatally open to divergent interpretations," leading the Court to declare that there was "no way of knowing precisely what criteria of job performance the supervisors were considering, whether each of the supervisors was considering the same criteria or whether, indeed, any of the supervisors applied a focused and stable body of criteria of any kind."[278] In *Rowe v. General Motors Corp.*[279] the supervisory personnel failed to receive instructions pertaining to the qualifications necessary for promotion. The Fifth Circuit declared that subjective processes are ready mechanisms of discrimination and that objective and reviewable criteria should be used whenever subjective evaluation results in adverse discrimination.[280]

Despite the substantial criticism of subjective evaluation systems for lower level positions, the courts have exhibited greater tolerance and have been less inclined to condemn them for professional level occupations.[281] It is arguable with respect to

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exaggerate the importance of this aspect of the interview, for a person with excellent grades may well simply fail to impress that small number of persons who have the ultimate selection responsibility.

Id. at 996 (citing G. COOPER, H. RABB & H. RUBIN, FAIR EMPLOYMENT LITIGATION 192 (1975)) (which quotes Defendant's Brief, Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974)).

274. *See* Kyles v. Calcasieu Parish Sheriff's Dep't, 395 F. Supp. 1307, 1310 (W.D. La. 1975). This hands-off approach by the courts was especially evident in academic employment cases. *See, e.g.*, Faro v. New York Univ., 502 F.2d 1229, 1231–32 (2d Cir. 1974) ("Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision."); Megill v. Board of Regents, 541 F.2d 1073, 1077 (5th Cir. 1976); Cooper v. Ross, 472 F. Supp. 802, 810 (E.D. Ark. 1979); Johnson v. University of Pittsburgh, 435 F. Supp. 1378, 1354 (W.D. Pa. 1977); Keddie v. Pennsylvania State Univ., 412 F. Supp. 1264, 1270 (M.D. Pa. 1976); Peters v. Middlebury College, 409 F. Supp. 857, 868 (D. Vt. 1976); EEOC v. Tufts Inst. of Learning, 421 F. Supp. 152, 158 (D. Mass. 1975); Labat v. Board of Higher Educ., 401 F. Supp. 753, 757 (S.D.N.Y. 1975).

275. Hung Ping Wang v. Hoffman, 694 F.2d 1146, 1148 (9th Cir. 1982).

276. Cases criticizing subjective evaluation for lower level jobs include: Crawford v. Western Elec. Co., 614 F.2d 1300, 1315–17 & nn.29–30 (5th Cir. 1980); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 328 (5th Cir. 1977); United States v. Hazelwood School Dist., 534 F.2d 805, 812–13 (8th Cir. 1976), *rev'd on other grounds*, 433 U.S. 299 (1977); Senter v. General Motors Corp. 532 F.2d 511, 528–30 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437, 440–41, (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377, 1382 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); Hester v. Southern Ry., 349 F. Supp. 812, 817 (N.D. Ga. 1972), *rev'd on other grounds*, 497 F.2d 1374, 1381 (5th Cir. 1974).

277. 422 U.S. 405 (1975).

278. *Id.* at 433.

279. 457 F.2d 348 (5th Cir. 1972). The promotional practices violated Title VII in five respects: The supervisor's recommendation was a condition precedent to employment, the supervisors were not given any written instructions as to the necessary qualifications, controlling standards were vague and subjective, employees were not notified of the qualifications necessary for promotion, and there were no procedural safeguards to avert arbitrary decisions. *Id.* at 358–59.

280. *Id.* at 359. *See also* Swint v. Pullman-Standard, 539 F.2d 77, 105 (5th Cir. 1976).

281. Hereford v. Huntsville Bd. of Educ., 574 F.2d 268, 270 (5th Cir. 1978) (subjectivity in promotional decisions at the professional level, particularly at a competitive level, is not a violation of the law because the employer must be able to make personal and subjective judgments). *See also* Tuft v. McDonnell Douglas Corp., 581 F.2d 1304, 1306–07 (8th

upper echelon management and professional positions that subjective criteria are "not to be condemned as unlawful per se; in all fairness to applicants and employers alike, decisions about hiring and promotion in upper-level jobs cannot realistically be made using objective techniques alone."[282] Employers should recognize, however, the possibility of arbitrariness in subjective selection procedures and the potential for abuse.[283]

Lawyers filing Title VII claims have been unsuccessful in attacks on allegedly discriminatory practices resulting from subjective employment criteria. In *Milton v. Bell Laboratories, Inc.*[284] the court declared that a judgment of an employer in hiring an attorney may be subjective, but the decision must be vigorously reviewed to ensure that it is not masking an impermissible bias.[285] Relying on a *McDonnell Douglas Corp. v. Green*[286] analysis, however, the court denied plaintiff's claim. The court found sufficient objective evidence to substantiate the company's subjective decision that the plaintiff was not qualified for the position.[287]

In *Frausto v. Legal Aid Society of San Diego, Inc.*[288] the Ninth Circuit dismissed an attorney's claim of discriminatory hiring practices. Plaintiff had argued that objective evidence of a higher grade-point average and prior work experience made him more qualified than those who had received employment. The court rejected plaintiff's contentions, holding that a "poor interview, an unstable employment history [two jobs in two years], a poor reputation in the legal community and the inability to get along with people are legitimate, nondiscriminatory reasons for rejecting [plaintiff's] employment application and are sufficient to defeat an employment discrimination action under Title VII . . . ."[289] In *Falkenheiner v. Legal Aid Society of Baton Rouge, Inc.*[290] a federal court denied the sex discrimination charge of a woman who was twice rejected for the position of executive director of the Society. Although the plaintiff had extensive management experience within the organization and had served as interim director during a vacancy, the court refused to question the

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Cir. 1978); Adams v. Reed, 567 F.2d 1283, 1286 n.8 (5th Cir. 1978); Frausto v. Legal Aid Soc'y of San Diego, Inc., 563 F.2d 1324, 1329 (9th Cir. 1977); Falkenheiner v. Legal Aid Soc'y of Baton Rouge, Inc., 471 F. Supp. 429, 435 (M.D. La. 1979), EEOC v. E.I. duPont de Nemours and Co., 445 F. Supp. 223, 254–55 (D. Del. 1978); Agarwal v. Arthur G. McKee & Co., 16 Empl. Prac. Dec. (CCH) ¶ 8301, at 5570, 5578 (N.D. Cal. 1977), *aff'd*, 644 F.2d 803 (9th Cir. 1981); Frink v. United States Navy, 16 Fair Empl. Prac. Cas. (BNA) 67, 69–70 (E.D. Pa. 1977), *aff'd mem.*, 609 F.2d 501 (3d Cir. 1979), *cert. denied*, 445 U.S. 930 (1980); Keely v. Westinghouse Elec. Corp., 404 F. Supp. 573, 579–80 (E.D. Mo. 1975); Levens v. General Services Admin., 391 F. Supp. 35, 36 (W.D. Mo. 1975), *aff'd mem.*, 538 F.2d 332 (8th Cir. 1978). This fluctuating standard was explained in Canty v. Olivarez, 452 F. Supp. 762, 769 (N.D. Ga. 1978): "[T]he degree of subjectivity permitted in assessing an applicant's qualifications varies with the duties of the position sought and the selecting party's professional interaction with an applicant." *See generally* Comment, *Subjective Employment Criteria and the Future of Title VII in Professional Jobs*, 54 U. DET. J. URB. L. 165, 186 (1976); Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 WM. & MARY L. REV. 45, 51 (1979).

282. Rogers v. International Paper Co., 510 F.2d 1340, 1345 (8th Cir. 1975); Hester v. Southern Ry., 394 F. Supp. 812 (N.D. Ga. 1972), *rev'd on other grounds*, 497 F.2d 1374, 1381 (5th Cir. 1974).

283. *See* Note, *Title VII and Employment Discrimination in "Upper Level" Jobs*, 73 COLUM. L. REV. 1614, 1632 (1973).

284. 428 F. Supp. 502 (D.N.J. 1977).

285. *Id.* at 507.

286. 411 U.S. 792 (1973). *See supra* text accompanying notes 36–45.

287. Milton v. Bell Laboratories, 428 F. Supp. 502, 514–15 (D.N.J. 1977).

288. 563 F.2d 1324 (9th Cir. 1977).

289. *Id.* at 1329.

290. 471 F. Supp. 429 (M.D. La. 1979).

decision of her employer regarding her application. The court reasoned that because the required job qualifications were written and the Board of Directors had clearly articulated written, unambiguous business reasons for the decision, plaintiff's claim must fail.[291]

A plaintiff must prove discrimination by either coming forward with direct evidence or demonstrating that the employer had, at some time, given him or her a favorable evaluation in terms of legitimate subjective criteria.[292] Thus, the mere use of subjective criteria by an employer does not by itself establish an inference of discrimination or a prima facie case.[293]

On the other hand, statistical evidence demonstrating the absence of female partners may support a prima facie case of sex discrimination,[294] although litigants who are successful in establishing that an employment practice discriminates against them may still be required to rebut an employer's justification of the practice. Although the court found in *Fogg v. New England Telephone and Telegraph Co.*[295] that because of the employer's promotion policy a female employee had suffered a discriminatory denial of promotional opportunities, the court nonetheless denied relief, stating that the woman's aggressive and ambitious character justifed the decision of the company:

> While these traits are supposedly ones that make for success in business, they also run counter to the tendency of any bureaucratic hierarchy to perpetuate itself and protect its members against any sudden change or disruption of the established routine. . . . [W]hat the Company required at this management level was primarily conformity and the ability to get along with other personnel.[296]

Although Title VII theoretically eliminated employment decisions based on sexual sterotypes,[297] female attorneys are still struggling to overcome paternalistic assumptions, thus making them particularly susceptible to subjective employment criteria. Law firm evaluation systems use largely unarticulated, cryptic criteria developed and refined by men.[298] Stereotypic assumptions create the equivalent of a bona fide occupational exception that employers use to escape the jurisdiction of Title VII, although the Supreme Court has held that stereotypic impressions of male and female roles do not qualify gender as a bona fide occupational qualification.[299] It has been postulated, for example, that the manner and psychology of women are poorly

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291. *Id.* at 435.

292. Note, *supra* note 120, at 305–06.

293. Eubanks v. Pickens-Bond Constr. Co., 635 F.2d 1341, 1347 (8th Cir. 1980); Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1016 (2d Cir.), *cert. denied*, 452 U.S. 940 (1980).

294. *See* Comment, *Subjective Employment Criteria and the Future of Title VII in Professional Jobs*, 54 U. DET. J. URB. L. 165, 222 (1976). In a disparate impact case, statistical comparisons are the central form of proof. *See* Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971). For disparate treatment cases, the Supreme Court has declared that statistical proof may be used as competent evidence to prove employment discrimination. International Bhd. of Teamsters v. United States, 431 U.S. 324, 339–40 n.20 (1977).

295. 346 F. Supp. 645 (D.N.H. 1972).

296. *Id.* at 649.

297. *See supra* text accompanying note 22.

298. *See* Margolik, *Wall Street's Sexist Wall*, NAT'L L.J., August 4, 1980 at 58, col. 2.

299. Los Angeles Dept. of Water v. Manhart, 435 U.S. 702, 707 (1978).

suited to the professional requirements of an adversary system.[300] Courts have also encountered, and have striven to eradicate, presumptions based on allegedly innate characteristics such as the belief that men are better able to conceal their feelings and thus are better suited for competition in the legal arena. Another justification repeatedly urged by employers is that clients prefer to transact business with male lawyers, and therefore, a female attorney would be detrimental to the profit-making capacity of a firm.[301] The courts, however, as well as the EEOC, traditionally have refused to allow discriminatory employment practices based on customer preference.[302]

What is probably the most frequently raised complaint about women lawyers is that they are not totally committed to their careers because they give their husbands and families priority over their job and the firm.[303] Courts have taken a dim view, however, of discrimination based on marital status;[304] such arguments may be viewed as mere pretexts and wholly inadequate grounds for discriminatory practices.[305] The imposition of employment preferences based on sex is permissible only when the essence of the business would be undermined by not utilizing members of one sex exclusively.[306] Moreover, the obligation imposed upon the employer to avoid sex-based stereotyping is not unduly burdensome. One court has pointed out that "although a law firm is [allowed] to make complex, subjective judgments as to how impressive an applicant is, it is not free to inject into the selection process the *a priori* assumption that, as a whole, women are less acceptable professionally than men."[307] Thus, although courts will review the selection process when it contains a measure of procedural unfairness or bias, the methodology of the system may remain intact.

The complex nature of a professional job and the lack of objectively verifiable standards of adequate performance require the courts to adopt a more sophisticated approach to employment discrimination problems than that used for lower level positions. Courts must reject the stereotypes connected with women attorneys and focus on the particular facts of the case before them. The problem requires an individualistic approach because of the nature of subjective judgments. If the plaintiff establishes a case of employment discrimination based on subjective employment

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300. Pearson & Sachs, *Barristers and Gentlemen: A Critical Look at Sexism in the Profession*, 43 MOD. L. REV. 400, 408 (1980).

301. Note, *Self Defense for Women Lawyers: Enforcement of Employment Rights*, 4 U. MICH. J. L. REF. 517, 532 (1971).

302. *See, e.g., EEOC Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.2(a)(1)(iii) (1982); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir.), (failure to hire male flight attendants not justified by passenger preference), *cert. denied*, 404 U.S. 950 (1971); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1277 (9th Cir.) (stereotyped customer preference does not justify sexually discriminatory practice), *cert. denied*, 404 U.S. 950 (1981); Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 303 (N.D. Tex. 1981). *See also* White, *Women in the Law*, 65 MICH. L. REV. 1051, 1102–03 (1967).

303. *See* Margolik, *Wall Street's Sexist Wall*, NAT'L L.J., August 4, 1980 at 1, col. 1; P. HOFFMAN, LIONS OF THE EIGHTIES 213 (1982).

304. *See supra* text accompanying notes 26–30.

305. These common perceptions of female attorneys were analyzed and rejected in White, *Women in the Law*, 65 MICH. L. REV. 1051, 1088–95 (1967).

306. Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198–99 (7th Cir. 1971).

307. Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 521 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2nd Cir. 1974) (emphasis in the original).

criteria, the court should place the burden on the employer to produce a reasonable explanation of the system and how it operates.[308] Indeed, the rejection of an otherwise qualified individual on the basis of subjective considerations entitles the plaintiff "to the benefit of an inference of discrimination, which inference requires the defendants to come forward and articulate legitimate reasons for her [the plaintiff's] non-selection."[309] The employer should explain (1) what the job entails and what constitutes effective performance, (2) the basis used to conclude that the system is selecting the best employee, (3) whether any less discriminatory methods of selection exist, and, if so, (4) why those systems of selection would not work as well as the one chosen by the employer.[310] This approach is not a rejection of the meritocratic method of employee analysis; rather, it simply allows courts to explore whether a reasonable justification exists for the employer's subjective selection. "When any selection procedure is used, the essential principle is that evidence be accumulated to show a relationship between decisions based on assessments made by that procedure and criteria such as job performance. . . ."[311]

The selection of persons for promotions on the basis of ability, work record, performance, and merit is legitimate and not prohibited by Title VII, provided that even if the plaintiff makes out a prima facie case of discrimination, the employer can demonstrate that the selection of one person over another is not the result of an intention to discriminate.[312] Selection systems utilizing subjective factors can be legitimated by the employer demonstrating that the employment decision was not arbitrary, but rather the result of a rational, fair system.[313] Criteria such as wealth, social status, and personal relationships, however, allow the expression of personal bias, thereby defeating the purposes of merit-based selection and perpetuating the status quo.[314] Requiring justification for an employer's selection processes would not place an undue burden on the employer, and it would allow a court to arrive at a more judicious determination of whether the practice has impermissibly violated the mandate of Title VII. Courts should not hesitate to subject selection procedures of upper

308. Objective job qualifications should be examined at step one of the *McDonnell Douglas* analysis, and subjective criteria are best treated at the later stages of the process. Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1344 (9th Cir. 1981).

309. Bauer v. Bailar, 647 F.2d 1037, 1045 (10th Cir. 1981). *See also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

310. Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 997–98 (1982).

311. DIVISION OF INDUSTRIAL-ORGANIZATIONAL PSYCHOLOGY, AMERICAN PSYCHOLOGICAL ASS'N., PRINCIPLES FOR THE VALIDATION AND USE OF PERSONNEL SELECTION PROCEDURES I (2d ed. 1980).

312. Kelley v. Norfolk & W. Ky. Ry. Co., 458 F. Supp. 244, 252 (D. Va. 1977), *aff'd*, 584 F.2d 34 (4th Cir. 1978).

313. *See, e.g.*, Brown v. Delta Airlines, Inc., 25 Empl. Prac. Dec. (CCH) ¶ 31,528 (S.D. Tex. 1980) (discriminatory denial of promotion allegation rejected because employer's evaluation form was specific, the supervisors were given adequate guidelines, evaluation process safeguards included review by higher management levels, the supervisor's evaluation was open to employee examination, and the evaluation of the supervisor was not the single determinative factor in the employment decision).

314. *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 996 (1982).

level employers to close scrutiny simply because discretionary, subjective judgments are used. The obligation of a court to fulfill the mandate of Title VII should alleviate any reluctance a court may have about reviewing subjective employment criteria.[315]

V. Remedies for a Title VII Litigant

If a court finds that an employer intentionally engaged in an unlawful employment practice, the court may order any equitable relief it deems appropriate.[316] The remedy granted should reflect the purposes of Title VII—prohibition of discrimination and compensation for injuries incurred. The Supreme Court has declared that a court's remedy should demonstrate that the policy outlawing inequality in employment opportunity receives the highest priority.[317] Title VII attempts to make a victim whole insofar as possible,[318] but it does not place the victim in a better position than she would have been absent the discrimination.[319] A court has extensive discretion in selecting an appropriate remedy and is restricted only if the individual was denied employment opportunities for any reason other than discrimination.[320] Courts have applied the traditional Title VII remedies when discrimination has been proved in professional employment situations.[321] Although discriminatory denial of partnership promotion may pose a unique situation, a court should not be deterred from formulating appropriate remedies.

A. *Injunctive Relief*

Courts may order injunctive relief and appropriate affirmative action including reinstatement, hiring, promotion or any other equitable relief that the court deems

315. Several commentators have argued that judicial reluctance to interfere with subjective selection processes for upper level positions stems from the judges' former employment as attorneys. "Judges defer to the employers with whom they identify, and they uphold the kinds of selection systems from which they have benefitted." Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947, 979 (1982). *See also* Note, *supra* note 113, at 473.

316. 42 U.S.C. § 2000e-5(g) (1976). *See generally* Isaac, *A Survey of Remedies Under Title VII*, 5 Colum. Hum. Rts. L. Rev. 437 (1973).

317. Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976); Albemarle Paper Co. v Moody, 422 U.S. 405, 416 (1975).

318. Thompson v. Sawyer, 678 F.2d 257, 290 (D.C. Cir. 1982).

319. Clark v. Marsh, 665 F.2d 1168, 1172 (D.C. Cir. 1981).

320. 42 U.S.C. § 2000e-5(g) (1976). This provision requires the plaintiff to prove that she would have been promoted if she had not been discriminated against. *See* Richerson v. Jones, 551 F.2d 918, 923 (3d Cir. 1977). *But see* Wang v. Hoffman, 30 Fair Empl. Prac. Cas. (BNA) 703, 705 (1982) (employee does not have to prove that, but for the discrimination, he would have been promoted).

321. Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980) (back pay and reinstatement with promotion to tenured position for discriminatory denial of tenure); Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977) (two retroactive promotions for a black engineer); Foster v. Simon, 467 F. Supp. 533 (W.D.N.C. 1979) (retroactive promotion for a female tax auditor); Kamberos v. GTE Automatic Elec. Inc., No. 74 C. 151 (N.D. Ill. 1978) (corporation required to hire female attorney), *rev'd in part*, 603 F.2d 598 (7th Cir. 1979); EEOC v. Tufts Inst. of Learning, 421 F. Supp. 152 (D. Mass. 1975) (preliminary injunction compelling reinstatement); Gates v. Georgia-Pacific Corp., 326 F. Supp. 397 (D. Or. 1970) (corporation must offer accounting position to black person), *aff'd*, 492 F.2d 292 (9th Cir. 1974). *Cf.* Pennsylvania Human Relations Comm'n v. Thorp, Reed & Armstrong, 25 Pa. Commw. 295, 361 A.2d 497 (1976) (lawyer reinstated after retaliatory dismissal). *But see* EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919 (S.D.N.Y. 1976) (denial of reinstatement for advertising executive, but money damages allowed), *aff'd without opinion*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

appropriate.[322] "A determination of whether injunctive relief is appropriate hinges on a balance of the various equities between the parties and the result must be consistent with the purpose of Title VII and the 'fundamental concepts of fairness.'"[323] While injunctive relief requiring a restoration of an associate to partnership status in her former law firm would be the most liberal remedy a court could order, it most closely approximates the purposes of Title VII's remedy provisions. In *Pennsylvania Human Relations Commission v. Thorp, Reed & Armstrong*[324] the plaintiff had filed a charge with a state civil rights agency alleging that her employer had denied her advancement to partnership because of her sex and age. When the law firm learned of her action, she was placed on an indeterminate leave of absence with pay. The court ordered her reinstatement, holding that although the plaintiff was receiving her salary, she was deprived of office space and other services as well as the prestige that comes from being an associate with a good law firm.[325]

The *Thorp* case, however, proceeded under a retaliation theory rather than under a strict denial of employment opportunities approach. Although the scenario posed by *Hishon* is not a retaliatory firing, it is a discharge resulting from the law firm's employment policy. Under the broad discretion granted by Title VII, a court has the authority to order reinstatement and promotion for an associate who was forced to resign because of a firm's up or out policy. Furthermore, if the court decided to award partnership status to the former employee, it would be complying with Title VII's mandate that the elimination of discrimination is sufficiently important to overcome the interest in privacy and associational rights that a law firm partnership would advance.

Ordering reinstatement and promotion of an attorney to partnership status may not, however, be appropriate in every situation.[326] At common law, breach of a contract for personal service generally led to awards of monetary relief rather than specific performance.[327] Courts prefer not to impose potentially adverse relationships

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322. 42 U.S.C. § 2000e-5(g) (1976). *See generally Affirmative Action Symposium*, 26 WAYNE L. REV. 1199 (1980); Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Davidson, *Preferential Treatment and Equal Opportunity*, 55 OR. L. REV. 53 (1976); Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1 (1975). A remedial order by the court will be either proscriptive or corrective. Proscriptive orders require the employer to cease the illegal practice, whereas corrective orders substitute new employment practices for the improper methods. G. COOPER, H. RABB, & H. RUBIN, FAIR EMPLOYMENT LITIGATION, 430 (1975). Affirmative action practices are permissible when the preference given to protected members of a class is designed to remedy specific or identifiable past discrimination rather than general social discrimination. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307-09 (1978).

323. Kamberos v. GTE Automatic Elec., Inc., 603 F.2d 598, 603 (7th Cir. 1979) (citing Williams v. General Foods Corp., 492 F.2d 399, 407 (7th Cir. 1974)). *See generally* Note, *Employment Discrimination Suits by Professionals: Should the Reinstatement Remedy be Granted?*, 39 U. PITT. L. REV. 103, 108 (1977).

324. 25 Pa. Commw. 295, 361 A.2d 497 (1976).

325. *Id.* at 304, 361 A.2d at 502. Retaliation for filing a discrimination charge with a proper agency is also illegal under Title VII. 42 U.S.C. § 2000e-3(a) (1976).

326. Similarly, in a discriminatory hiring practices action, the nature of the legal field may present obstacles to injunctive relief. In *Kamberos v. GTE Automatic Elec., Inc.*, 603 F.2d 598, 603 (7th Cir. 1979) the court reversed the district court's order granting injunctive relief that required the defendant employer to hire the plaintiff as a corporate attorney. A hiring order is not appropriate unless the person discriminated against is presently qualified to assume the position sought. *Id.* at 603 (citing Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 772 n.31 (1976)). The court found the plaintiff unqualified to assume the position sought because substantial changes had occurred since plaintiff had had any significant corporate law experience. *Id.* at 603.

327. *See* Stevens, *Involuntary Servitude by Injunction*, 6 CORNELL L.Q. 235, 238 (1921).

on litigants, as this too much resembles involuntary servitude.[328] A court must weigh fulfillment of the purposes of Title VII against the law firm's need to continue functioning as a business entity. Animosity between the parties may have escalated to the point at which reinstatement would create an intolerable situation.[329] The law firm's internal affairs may be disrupted significantly if the partnership agreement requires unanimous consent of all partners before a new partner can be admitted. Law firm partners generally participate equally in the management of the firm, and a person placed within their midst without their consent may have a disruptive effect upon the successful operation of the firm.

If a plaintiff is successful in proving her case, however, the court must formulate an appropriate remedy. If the plaintiff wins, she must have shown that she was qualified for the position denied her; therefore, her competence should not be a hindrance in the court's formulation. The risk of detrimental effect upon the firm's profit-making capacity will be diminished because the firm will be ordered to accept only qualified attorneys as partners.

Associational problems should be examined in the context of the probable relations within the group of colleagues with whom the plaintiff would work if reinstated with partnership status.[330] The size and complexity of the law firm, the nature of its professional working relationships, and its support of the plaintiff are important characteristics to be considered by the court.[331] In a *Hishon* situation, injunctive relief may be appropriate because of the size of the law firm. The magnitude and diversity of practice in a large firm diminishes the opportunity for direct confrontation.[332] When a law firm has a large number of lawyers, the plaintiff's relationship with each individual partner or associate is of less importance, and the court should concentrate on the plaintiff's ability to function effectively within her particular department.

B. *Monetary Damages*

An award of back pay is the most popular remedy sought under Title VII. Absent extraordinary circumstances, back pay is awarded as the most complete relief possible for the proscribed discrimination.[333] The Supreme Court has held that an employer's good faith is not a sufficient reason for denying back pay.[334] Back pay liability can accrue from two years prior to the filing of a charge, but any amount

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328. *See* 5A A. CORBIN, CORBIN ON CONTRACTS § 1204 (1964).

329. *See, e.g.*, EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919, 927 (S.D.N.Y. 1976) (so much animosity present that reinstatement of the plaintiff not a workable remedy), *aff'd without opinion*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977). *See also* Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945, 957 (10th Cir. 1980).

330. Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 MICH. L. REV. 282, 320 (1978).

331. Note, *supra* note 113, at 469.

332. *See* Note, *Employment Discrimination Suits by Professionals: Should the Reinstatement Remedy Be Granted?*, 39 U. PITT. L. REV. 103, 115 (1977).

333. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975); Womack v. Munson, 619 F.2d 1292, 1299 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981).

334. Albemarle Paper Co. v. Moody, 422 U.S. 405, 422–23 (1975).

earned by the plaintiff in the interim shall act as a set-off.[335] Legal employers have not been immune to back pay awards. In *Kamberos v. GTE Automatic Electric, Inc.*[336] the Seventh Circuit held that the plaintiff was eligible for back pay when the company failed to hire her for a corporate attorney position.[337] Plaintiff's damages were established by measuring the difference between her actual earnings and those that she would have earned absent the discrimination.[338] The court held that any uncertainty in determining what an employee would have earned should be resolved against the discriminating employer.[339]

Although a court could award an associate back pay from the time of termination resulting from an adverse partnership decision, the alternative to awarding partnership status (reinstatement concurrent with promotion) is the theory of front pay.[340] Front pay is equitable monetary relief for any future loss of earnings resulting from discriminatory conduct of the defendant.[341] In *EEOC v. Kallir, Phillips, Ross, Inc.*,[342] the federal district court refused reinstatement because of the animosity caused by litigation, but awarded the plaintiff front pay calculated to compensate her until she could find equivalent employment.[343] Awards of front pay are designed to "further the goals of ending illegal discrimination and rectifying the harm it causes."[344] Front pay may be embraced by some courts because of the general hesitancy to award either compensatory[345] or punitive damages[346] that are not explicitly authorized by the statutory "other equitable relief."

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335. 42 U.S.C. § 2000e–5(g) (1976). *See* Verzosa v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 589 F.2d 974, 976 (9th Cir. 1978).

336. 603 F.2d 598 (7th Cir. 1979).

337. *Id.* at 602.

338. *Id.*

339. *Id.* at 603 n.6 (citing United States v. United States Steel Corp., 520 F.2d 1043, 1050 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976)).

340. *See* Thompson v. Sawyer, 678 F.2d 257, 292 (D.C. Cir. 1982); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 932 (10th Cir. 1979); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 358 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); EEOC v. Enterprise Ass'n Steamfitters, Local 638, 542 F.2d 579, 590 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977); Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); Bush v. Lone Star Steel Co., 373 F. Supp. 526, 538 (E.D. Tex. 1974).

341. Johnson v. Ryder Truck Lines, 12 Fair Empl. Prac. Cas. (BNA) 895, 914 (W.D.N.C. 1975), *aff'd in part*, 575 F.2d 471 (4th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979).

342. 420 F. Supp. 919 (S.D.N.Y. 1976), *aff'd without opinion*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

343. *See also* Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945, 957 (10th Cir. 1980) (award of front pay in lieu of reinstatement is appropriate where reinstatement inadvisable because of past hostile and discriminatory treatment); EEOC v. Pacific Press Publishing Ass'n, 482 F. Supp. 1291, 1320 (N.D. Cal. 1979) (front pay given where reinstatement inappropriate).

344. Thompson v. Sawyer, 678 F.2d 257, 292 (D.C. Cir. 1982).

345. *See* Padway v. Palches, 665 F.2d 965, 968 (9th Cir. 1982); DeGrace v. Rumsfeld, 614 F.2d 796, 808 (1st Cir. 1980); Harrington v. Vandalia-Butler Bd. of Educ., 585 F.2d 192, 194–97 (6th Cir.), *cert. denied*, 441 U.S. 932 (1978); Pearson v. Western Elec. Co., 542 F.2d 1150, 1152–53 (10th Cir. 1976); Charles v. National Tea Co., 488 F. Supp. 270, 276 (W.D. La. 1980); Wilson v. Califano, 473 F. Supp. 1350, 1354 (D. Colo. 1979); Schofield v. Stetson, 459 F. Supp. 998, 999 (D. Ga. 1978); Dual v. Griffin, 446 F. Supp. 791, 800 n.40 (D.D.C. 1977); Curran v. Portland Superintending School Comm., 435 F. Supp. 1063, 1078 (D. Me. 1977); Whitney v. Greater New York Corp. of Seventh Day Adventists, 401 F. Supp. 1363, 1368–71 (S.D.N.Y. 1975); Howard v. Lockheed-Georgia Co., 372 F. Supp. 854, 855–56 (N.D. Ga. 1974). *But see* Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90, 96 (3d Cir. 1973) (compensatory damages can be awarded for Title VII action); Ahmad v. Independent Order of Foresters, 81 F.R.D. 722, 730 (E.D. Pa. 1979) (compensatory damages are available in actions under 42 U.S.C. § 2000e–5); Humphrey v. Southwestern Portland Cement Co., 369 F. Supp. 832, 838 (W.D. Tex. 1973) (employee may be awarded damages for emotional distress and loss of experience), *rev'd on other grounds*, 488 F.2d 691 (5th Cir.), *reh'g denied*, 490 F.2d 992 (5th Cir. 1974).

346. *See, e.g.*, Great Am. Fed. Sav. and Loan Ass'n. v. Novotny, 442 U.S. 366, 375 (1979); Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650, 654 (5th Cir. 1980); DeGrace v. Rumsfeld, 614 F.2d 796, 808 (1st Cir. 1980);

Front pay is equal to expected future earnings. In a case involving denial of partnership status, the amount would equal the difference between the associate's current salary and the average compensation received by individuals who became partners concurrent with the adverse decision for the complainant. Although the discharged associate would have to mitigate the damages by seeking comparable employment, the law firm would still incur significant liability based on the difference between her new salary and that paid to partners in her former firm.[347]

There are, however, several impediments to the awarding of monetary damages in the form of front pay. Front pay for lawyers would be difficult to compute because front pay is based on future earnings, and a partner's share fluctuates, depending upon the prosperity of the firm. Front pay envisions substantial monetary awards, and therefore it may be difficult to convince a court to award complete relief. Additionally, the threat of a large damage award with front pay could force law firms to settle unmeritorious claims, thereby encouraging the filing of Title VII claims, regardless of their merit.

Furthermore, front pay is not a satisfactory remedy for all plaintiffs. The purpose of Title VII is to "make the person whole" and restore her to the position that she would have achieved but for the discrimination. A monetary damage award may compensate for one aspect of the effect of discrimination, but the individual remains without the prestige, job security, personal satisfaction, and enhanced professional responsibilities that the job denied her would have encompassed.[348] Similarly, front pay will not compensate an attorney for diminished employment opportunities if she is unable to find another comparable job.[349] Moreover, even if the attorney is able to find another position, she may not be as valuable to her new employer as she was in her former job, where her substantive knowledge, familiarity with law firm procedures, and contacts with clients were accumulated through several years of experience.

Attorneys' fees may be awarded as an additional form of monetary damages available to Title VII litigants. A prevailing plaintiff is entitled to reasonable attorneys' fees unless special circumstances exist that would render such an award unjust.[350] Attorneys' fees are granted because the plaintiff in a Title VII action assumes the role of a private attorney general, and is responsible for implementing the congressional policy of encouraging individuals to undertake vindication of the strongly

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Richerson v. Jones, 551 F.2d 918, 927 (3d Cir. 1977), EEOC v. Detroit Edison Co., 515 F.2d 301, 308–10 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977); Curran v. Portland Superintending School Comm., 435 F. Supp. 1063, 1078 (D. Me. 1977); Jiron v. Sperry-Rand Corp., 423 F. Supp. 155, 165 (D. Utah 1975). *But see* Waters v. Heublein, Inc., 8 Fair Empl. Prac. Cas. (BNA) 908, 909 (N.D. Cal. 1974) (plaintiff entitled to recover punitive damages if she can prove defendents acted with necessary malice), *rev'd on other grounds*, 547 F.2d 466 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977); Dessenberg v. American Metal Forming Co., 6 Fair Empl. Prac. Cas. (BNA) 159, 161 (N.D. Ohio 1973) (punitive damages might be proper award under Title VII).

347. Indeed, after her dismissal, Ms. Hishon began working for another Atlanta law firm, thereby fulfilling her responsibility to mitigate the damages. *See* Hishon v. King & Spalding, 25 Empl. Prac. Dec. (CCH) ¶ 31,703, at 20,064.

348. *See generally* Note, *supra* note 113, at 465. *See also supra* text accompanying note 325.

349. *See generally* Johnson v. University of Pittsburgh, 359 F. Supp. 1002 (W.D. Pa. 1973); Note, *Employment Discrimination Suits by Professionals: Should the Reinstatement Remedy Be Granted?*, 39 U. PITT. L. REV. 103, 113 (1977).

350. 42 U.S.C. § 2000e-5(k) (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975).

expressed national policy against discrimination.[351] Similarly, a prevailing defendant can be awarded attorneys' fees if the plaintiff's action was frivolous, unreasonable, or without foundation.[352]

C. *Settlements*

Hishon is one of the few discrimination suits brought against law firms to have reached the adjudicatory stage. Since the expense of pursuing a claim through the trial stage is becoming prohibitively large, many suits are settled out of court prior to the trial date. An analysis of settlements is necessary, however, because the proceedings to obtain court approval of a settlement agreement require a hearing on the appropriateness of the remedies. Thus, an approved settlement is nearly equivalent to the remedy resulting from a fully litigated case.[353] Several settlements of law firm discrimination suits have been publicized and serve as potential guidelines for parties seeking a resolution of their differences.[354]

In *Blank v. Sullivan & Cromwell*[355] a federal district court settled the suit by allowing review by plaintiff of hiring, assignments, promotion, and salary schedules of women and men, review of salary and bonus information relating to associates, and information as to associate appraisals.[356] The firm was required to appoint an administrator to ensure that the defendant was not pursuing discriminatory employment practices. The plaintiffs also were to review all recruiting materials, interview guidelines, and records on interviewing. The firm anticipated that the number of women offered employment in the future would be comparable to the percentage of female applicants for a particular year. The firm was ordered to request from each law school designated in the plan information on the number of men and women in the second and third year classes. Defendant also paid plaintiff's counsel $30,000 in legal fees.

In *Kohn v. Royall, Koegel & Wells*[357] the federal district court settlement awarded $40,000 to the plaintiff and ordered quotas for job offers to women whereby

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351. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 63 (1980); Fischer v. Adams, 572 F.2d 406, 410–11 (1st Cir. 1978); Foster v. Boorstin, 561 F.2d 340, 342 (D.C. Cir. 1977); Parker v. Califano, 561 F.2d 320, 330 (D.C. Cir. 1977); Johnson v. United States, 554 F.2d 632, 633 (4th Cir. 1977).

352. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). The following factors have been used by courts in determining appropriate fee awards:

> (1) the time and labor required; (2) the skill requisite to properly perform the legal services; (3)[the] preclusion of other employment by the attorney due to acceptance of the case; (4) the novelty and difficulty of the questions presented; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client; (8) the amount involved and the results obtained; (9) experience, reputation and ability of the attorneys; (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Morrow v. Dillard, 580 F.2d 1284, 1300 (5th Cir. 1978). *See also* Reynolds v. Coomey, 567 F.2d 1166, 1167 (1st Cir. 1978); Copeland v. Marshall, 18 Fair Empl. Prac. Cas. (BNA) 468 (App. D.C. 1978); Prandini v. National Tea Co., 557 F.2d 1015, 1018 (3d Cir. 1977); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974).

353. EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 173–74 (3d Cir. 1977).

354. *See generally* Comment, *Subjective Employment Criteria and the Future of Title VII in Professional Jobs*, 54 U. DET. J. URB. L. 165, 224–27 (1976).

355. 418 F. Supp. 1 (S.D.N.Y. 1977).

356. *Id.* at 3. *See also* Bardeen, *supra* note 91 at 365; P. HOFFMAN, LIONS OF THE EIGHTIES 211–12 (1982).

357. 59 F.R.D. 515 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974). The firm is now called Rogers & Wells.

for three years, the firm would give job offers to 20 percent more women than the percentage of women in the graduating classes at the law schools where it recruited. The court ordered the firm to use rational criteria such as academic success, ability to understand and communicate conceptual ideas, and judgmental ability.[358] The settlement obviously was designed to objectify the evaluations of the candidate's qualifications and to inject a degree of job-relatedness into the selection criteria. The firm also was required to request the clubs in which it had established memberships to reverse their all-male policies.[359] Additionally, the firm had to invite and encourage women attorneys to participate, on the same basis as men, in firm-sponsored social events and meetings with clients. The firm could not organize or sponsor any events or meetings in clubs where women were excluded from membership.[360] These settlements demonstrate that Title VII can be used by women to attack the traditional methods of discrimination practiced by large institutionalized law firms.

VI. AVOIDANCE OF TITLE VII PROBLEMS

A. *Compliance*

The practical test of compliance is how well the firm's employment policies would stand up in court. If the firm is charged with discrimination because a woman was not promoted, the partnership may have to demonstrate that some male employees with qualifications equal to hers also were passed over. A legitimate reason for denying promotion opportunities is that the unsuccessful candidates did not measure up to the employer's standards to the same extent as the person finally selected.[361] In *Hishon* the plaintiff's position was not unique because potential male candidates for partnership were similarly refused. In a footnote, the majority opinion in *Hishon* declared, "It is significant to note that the partnership made the same [negative] decision with respect to two male associates, while other male associates within the group were invited to join the partnership."[362] Although this evidence did not, in and of itself, prove that King & Spalding did not discriminate against the plaintiff, the majority may have inferred that the law firm had not unlawfully discriminated in excluding her and that the denial of partnership stemmed from some inadequacy of the associate.

When a denial of partnership results in termination, the law firm should be able to justify its decision with evidence of the associate's unsatisfactory performance. The law firm should document each instance that the management has counseled the employee about performance quality. If the discharge results in litigation, the firm's case will be stronger and more convincing if it reflects occasions when the appropriate supervisor praised and encouraged the employee in addition to necessary in-

358. *See* Galvin, *Taming the Lions in the Street with Title VII*, JURIS DOCTOR, Sept. 1976, at 8–11; P. HOFFMAN, LIONS OF THE EIGHTIES 211 (1982).

359. *See* Ginsburg, *Women as Full Members of the Club: An Evolving American Ideal*, 6 HUM. RTS. 1, 20 (1977).

360. *Id.*

361. *See* K. LAWRENCE, SEX DISCRIMINATION IN THE WORKPLACE 100 (1978); Lewis v. Central Piedmont Community College, 689 F.2d 1207, 1210 (4th Cir. 1982).

362. Hishon v. King & Spalding, 678 F.2d 1022, 1024 n.2 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

stances of admonition.[363] This type of evaluation implies objective analysis by the supervisor and eliminates the inference that personal prejudice or animosity was present between this particular supervisor and the employee. The firm's best defense is to show that other women have performed satisfactorily and attained partnership status.[364] In *Hishon* the district court commented, "It is also irrelevant to this opinion, but is somewhat supportive, to note that since the filing of this action King & Spalding now has a female partner."[365]

Although quantitative evidence of the hiring and promotion of other women may be of questionable significance in a disparate treatment case that focuses on an individual, courts do examine evidence of general firm policies. It is easier for a law firm to prove nondiscriminatory practices if the firm has a history of progressive attitudes regarding the advancement of women. Courts, however, must closely scrutinize the evidence presented, to determine whether it portrays a credible picture of the firm's employment policies. When confronted with an individual case, a court must examine the firm's policies as they existed when the discrimination is alleged to have taken place—not what they are at the time of trial. It is too easy for a firm to implement a few noble gestures in preparation for trial and then revert back to prior employment practices once the vulnerability of litigation has passed.

B. *Appraisal Methods*

Law firms must evaluate their personnel policies to determine whether they operate unfairly against a protected classification of people. The law firm should advise all its partners that factors of race, sex, color, religion or national origin are inappropriate considerations in the selection of new partners.[366] Title VII is violated when an employing organization uses discriminatory evaluations of an employee that were prepared by its own supervisory personnel unless the employee has received a reasonable opportunity to inspect and correct these evaluations.[367] Unless law firms want to subject their employee evaluations to inspection, the law firms must ensure that discriminatory attitudes do not invade the evaluation procedure.[368] The law firm should adopt written guidelines for employee evaluations so that the partners can utilize uniform criteria when making their promotion decisions, thereby reducing the potential arbitrariness of the critique.

Moreover, these appraisal methods would increase profits and efficiency while reducing the risk of a Title VII action. The firm's appraisal method should provide criteria for successful job performance and a measuring process to analyze the results. Many firms are evaluating associates earlier in their careers and informing them whether or not they are on "track" for partnership.[369]

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363. *See* K. LAWRENCE, SEX DISCRIMINATION IN THE WORKPLACE 110 (1978).

364. *Id.*

365. Hishon v. King & Spalding, 25 Empl. Prac. Dec. (CCH) ¶ 31,703, at 20,064 (N.D. Ga. 1980).

366. *See* Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 MICH. L. REV. 282, 287 (1978).

367. *See* Stoller v. Marsh, 682 F.2d 971, 971 (D.C. Cir. 1982).

368. *See supra* note 313.

369. *See* Morrison, *Making Partner: Tradition in Flux*, NAT'L. L. J., April 12, 1982, at 1 col. 3.

The function of a performance appraisal is to (1) provide constructive performance feedback to each person, (2) serve as a basis for modifying or changing behavior to achieve more effective working habits, and (3) provide the partnership with objective data to assist in the judging of future job assignments and compensation.[370] A law firm can insulate itself from Title VII liability by establishing procedures to allow employees to screen their personnel files and to remove damaging, discriminatory information.[371] The law firm must notify its employees, however, that they have the right to inspect and challenge their evaluations. If a law firm can demonstrate to the court that an associate has not received good periodic reviews, or has been warned that he or she was unlikely to achieve partnership status, and has given the associate the opportunity to review her file, the law firm will have defused significantly the possibility of an adverse decision in a discrimination case.

C. *An Alternative to "Up or Out"*

Law firms that maintain an "up or out" policy are highly vulnerable to the Title VII prohibitions against discriminatory discharge. Law firms are loathe to fire an associate because the associate generally is bringing some money into the firm, and the firm may have invested a considerable amount of time and money training the associate. If the firm continually passed the associate at her periodic reviews in hopes of better performance in the future, it will be harder to prove nondiscriminatory treatment in rejecting her for partnership and forcing her to leave the firm.

Because the "up or out" policy has such drastic consequences, many firms are seeking alternatives. Some firms are allowing their associates to be considered for partnership more than once while others are allowing the person to stay with the firm in a "permanent associate" capacity.[372] The permanent association plan is feasible because it addresses some of the criticisms of the partnership process and eliminates the possibility of discriminatory termination. If the associate is paid the same amount of money as if she were a partner, she will have lost only the status and a say in the operations of the firm. In a large firm that is controlled by committees, she will have lost only the status of partnership. Without any tangible evidence of economic consequence, an associate would have a harder time trying to fit under Title VII.[373] In *Hishon* the dissenting opinion focused on the result of King & Spalding's up or out policy and found that because termination was inextricably intertwined with the policy, Title VII should apply.[374]

The development of a permanent associate position within a firm must be closely scrutinized, however, to ensure that the firm is not formulating a two-track promotional system. A firm obviously could not lawfully restrict its partnership track to

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370. Evans, *Developing Performance Appraisal Methods for Lawyers*, 22 LAW OFFICE ECONOMICS AND MANAGEMENT 50, 54 (1981).

371. *See* Stoller v. Marsh, 682 F.2d 971, 979 (D.C. Cir. 1982).

372. *See* White, *Women in the Law*, 65 MICH. L. REV. 1051, 1105 (1967).

373. Morrison, *Making Partner: Tradition in Flux*, NAT'L. L.J. April 12, 1982, at 29, col. 2.

374. Hishon v. King & Spalding, 678 F.2d 1022, 1030 (11th Cir. 1982) (Tjoflat, J., dissenting), *cert. granted*, 103 S. Ct. 813 (1983).

men simply because it may allow women to be employed as permanent associates. The law firm cannot establish male and female jobs with differing privileges and pay.[375] King & Spalding did this with its first female attorney when it kept her in a permanent associate position for thirty-three years.[376] Maintaining a permanent associate track would be permissible only if the firm did not discriminate in its partnership promotion decisions. The permanent associate theory would keep employees working for the law firm, though, thus reducing the frequency of potential Title VII suits. The employee benefits from the system because he or she would retain most of the benefits that accompany working for the firm, including job security. Although the associate's compensation may not equal a partner's, at least there would be no decrease in the salary and periodic raises would be forthcoming.

VII. CONCLUSION

The remainder of the 1980s will bring increasing attention to fair employment problems in upper level positions. Deadend promotional channels, in conjunction with generally increasing levels of seniority and relevant job experience of working women will result in litigation focusing on the upward mobility of women in organizations.[377] The partnership decision in law firms will not be immune to litigation if law firms continue to discriminate against women attorneys. The sexual stereotypes regarding the competence of women in the legal arena must be abandoned for a more enlightened approach that befits the 1980s. Qualified women should advance within the profession and should not be held back by traditional notions that only men can be competent lawyers.

Courts should be active participants in the continuing evolution of female attorneys seeking the opportunities of the legal profession. The courts are responsible for upholding the mandate of Title VII that discrimination in employment should be eradicated. Law firms are not immune from this prohibition on discriminatory employment practices, and courts should not hesitate to subject them to Title VII jurisdiction. The *Hishon* decision effectively created an exception to Title VII jurisdiction. This, however, is contrary to Congress' intent to eliminate employment discrimination on all levels, including the professional positions. In the interest of justice, the discriminatory approach assumed by law firms and the courts should emerge as a subject for individual and collective self-examination, including a critique of the current legal professional style, and a recognition of the need to evolve a different approach which is both more equal and more responsive to changing social patterns.[378]

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375. *See* White, *Women in the Law*, 65 MICH. L. REV. 1051, 1105 (1967).

376. *See supra* text accompanying note 54.

377. Leap, Holley & Feild, *Equal Employment Opportunity and Its Implications for Personnel Practices in the 1980's*, 31 LABOR L.J. 669, 682 (1980).

378. Pearson & Sachs, *Barristers and Gentlemen: A Critical Look at Sexism in the Legal Profession*, 43 MOD. L. REV. 400, 414 (1980).